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REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT



By THOMAS CURRY,
Counsellor and Attorney at Law,
AND REPORTER OF THE DECISIONS OF THE SUPREME COURT.

VOLUME VII.

NEW-ORLEANS:
PRINTED BY BENJAMIN LEVY, CHARTRES-STREET.

1835.

NAMES OF THE JUDGES
OF THE
SUPERIOR COURT OF THE TERRITORY OF ORLEANS,
FROM 1809 TO MARCH, 1813.

Honorable GEORGE MATHEWS,
" JOSHUA LEWIS,
" JOHN THOMPSON,
" [*] FRANÇOIS XAVIER MARTIN.

NAMES OF THE JUDGES
OF THE
SUPREME COURT OF THE STATE OF LOUISIANA.

Honorable DOMINICK AUGUSTIN HALL, appointed February 22, 1813.
" GEORGE MATHEWS,appointed February 23, 1813.
" PIERRE DERBIGNY,appointed March 8, 1813.
" [a] FRANÇOIS XAVIER MARTIN, appointed January 31, 1815.
" [b] ALEXANDER PORTER, jr., appointed January 2, 1820.
" [c] HENRY A. BULLARD, appointed February 4, 1834.

ATTORNEYS GENERAL.

FRANÇOIS XAVIER MARTIN,.....appointed in 1813.
ETIENNE MAZUREAU, " " 1815.
LOUIS MOREAU LISLET, " " 1817.
THOMAS BOLLING ROBERTSON,..... " " 1819.
ETIENNE MAZUREAU, " " 1820.
ISAAC T. PRESTON, " " 1824.
ALONZO MORPHY, " " 1829.
GEORGE EUSTIS, " " 1830.
ETIENNE MAZUREAU, " " 1832.

REPORTERS OF THE DECISIONS OF THE SUPREME COURT.

BRANCH W. MILLER,.....appointed February 23, 1830.
THOMAS CURRY,..... " June 5, 1834.

[*] In the place of Judge THOMPSON, deceased.

[a] In the place of Judge HALL, made United States District Judge, for the District of Louisiana, in June, 1813.

[b] In the place of Judge DERBIGNY, resigned.

[c] In the place of Judge PORTER, who was on the 13th December, 1833, elected a Senator in Congress.

THIS volume, being Volume 7th of the "LOUISIANA REPORTS," contains the Cases determined from August Term, 1834, at Baton Rouge, to the close of February Term, 1835, in the Eastern District at New-Orleans, both inclusive.

¶ Judge MATHEWS did not join in the decisions at Alexandria, in the Western District, reported in this volume, being prevented by indisposition.

¶ There was no change in the officers of the Court during the period embraced by this volume, and since the publication of the preceding one.

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REPORTS
 OF
CASES ARGUED AND DETERMINED
 IN
THE SUPREME COURT
 OF
THE STATE OF LOUISIANA.

DEFERRED CASES.—EASTERN DISTRICT.
NEW-ORLEANS, JUNE, 1854.

DEPASSAU vs. WINTER ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In a possessory action the parties are precluded from going into an inquiry of titles; and the defendant will not even be permitted to show that the disputed premises is a public place or port, destined to public use.

EASTERN DIST.
June, 1854.

DEPASSAU
vs.

When the evidence shows that the *locus in quo* does not cover the high road, a street, levee or tow-path, and is consequently subject to private ownership, whether the plaintiff be the real owner or not; or whether the premises in dispute be public or appropriated absolutely to public uses? are questions not permitted by law in possessory actions.

WINTER ET ALS.

The plaintiff instituted his possessory action against the defendants on the 15th July, 1833, and alleges that he has been in the peaceable possession of a lot of ground situated in the Nuns faubourg, now within the limits of the city of Lafayette, lying between the public road and the river Mississippi, and in the actual occupation and possession of

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DEPASSAU
VS.
WINTER ET ALB.

his tenants. That on that day Joshua Winter, under pre-
tence of authority from the president and board of council of
the city of Lafayette, forcibly and illegally entered upon and
took possession of said lot, and drove off his tenants. He
prays that Winter be condemned to restore possession of the
disputed premises, pay him three hundred and fifty dollars in
damages, and that he be enjoined from acting any further in
the premises.

An injunction was granted as prayed for. On the 29th
July the plaintiff filed his supplemental petition, alleging that
Winter, styling himself harbor-master, has, since the granting
of the injunction, ordered his tenants to remove from the
ground in question, and threatens force in case of refusal.
He prays that Winter and the president and council of the
city of Lafayette be restrained and ordered to desist from all
manner of disturbance, except as relates to so much ground
as is required for banquettes or a levee, and subject to
public use.

The president and city council of Lafayette answered and
averred that the public street or road in front of the plaintiff's
lot, according to the original plan established by the nuns, is
sixty feet, French measure, in width, and that the levee
extends in width from the street to the river, and that the
possession and use of said street and levee has always been
in the public; which, by the act of incorporation, is given in
charge to the president and council of the city of Lafayette,
for the use of the public.

The defendants allege, they have been obstructed and
forcibly opposed by the plaintiff and his tenants in re-esta-
blishing the lines of said street and levee, in making ban-
quettes and gutters; and that the plaintiff and his agents
have constantly, for three months past, incumbered the street
and levee and bank of the river with wood and lumber, so as
to obstruct and prevent the landing and shipment of articles
of commerce in front of said property. They pray judgment
in re-convention for damages, and that the plaintiff be per-
petually enjoined from interfering or opposing their possession
and use of the disputed premises.

Winter pleaded a general denial, and denied specially having trespassed on the plaintiff's property; and declared that he was duly appointed harbor-master of the city of Lafayette, in which capacity he done the acts complained of, &c.

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The evidence for plaintiff established, that he had for several years past, say ten or twelve years, leased out the ground in question to various tenants; that the tenants possessed and occupied from the street to the margin of the river bank; that plaintiff maintained and repaired the street and levee. The ground, of which plaintiff claimed to be in possession, was not in any manner inclosed, but used as a lumber-yard.

Turner testifies, that there is a space of one hundred and twenty-eight feet from the north or swamp side of Tchoupitoulas-street to the water's edge at high water, and according to his calculation and views, deducting forty feet for landing and sixty-four feet for street, there would be a space of twenty-four feet in width and about two hundred in length, which will remain to plaintiff.

According to the testimony of the surveyors, Pilié and Buisson, in connection with the plan on which the Nuns faubourg was laid out, the "*highway*," now a continuation of Tchoupitoulas-street, is laid down so as to join with the levee, and the admeasurements taken on the scale of that plan would leave for levee and landing all the ground between the street and high water-mark. The inference would be that the ground, of which plaintiff alleges himself to be in possession, would be ground dedicated to public purposes so far as the use is concerned; the plaintiff would be entitled to the right of property according to a deed of a front lot, which was also offered in evidence, by which it appears they were expressly constituted proprietors of the river. The introduction of this plan and deed were opposed by plaintiff, on the ground that he had brought a possessory action, and that the only points of inquiry were his possession, and if that possession had been disturbed.

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The court admitted the evidence on general principles of law, and the authority in the case of *Allard et als. vs. Lobau. 3 Martin, N. S. 293.*

The district judge was also of opinion that the plea of the plaintiff, based on one year's prescriptive peaceable possession, could not be sustained against the *right of use of a public place*. The possessory action is only admissible when the possession is of a nature to acquire by prescription the right in which the plaintiff seeks to be maintained. *Paillet on art. 23 of Code of Procedure.*

On the merits the court was with the defendants. It appears, says the court, that there cannot be any of the common and usual modes of employing the ground between the high-way and the water's edge in a country like Louisiana, for such employment of it would deprive the public of a use to which they are entitled. If such ground were to be inclosed and used for pasture, &c., there could not be such ready means of embarkation and debarcation, as if no such obstructions existed, nor so convenient a tow-path. The banks of rivers in other countries usually present such obstacles from rocks and other obstructions, and the road must usually be carried along them at such a distance from the river, that there is a necessity for special landing places and the banks elsewhere may be inclosed. On the Mississippi it is equally convenient to embark at one place or another; it is one continued plain; its banks are a village, and the river itself a canal. If these observations have any weight with regard to the country, their force is much greater applied to a city and its faubourgs; and but for the rare exception of the case lately decided as to New-Orleans, I should be disposed to lay it down as a universal rule, that there cannot exist any such private use of ground between the highway and the water as will interfere with the public use and rights over such ground. I concur with the surveyors in their opinion derived from the plan, and this view of the matter is fortified by a personal inspection of the premises in presence of the parties referred to, that there is no land between the highway or Tchoupi-

toulas street continued, and the water's edge susceptible of being applied to the ordinary uses of private property; that the use of the ground in question is in the public, and that the acts of the plaintiff in claiming and exercising ownership and the uses he has put it to, are not warranted by any rights of property in him over the premises in question.

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June, 1834.

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WINTER ET ALB.

There was judgment dissolving the plaintiff's injunction, and putting the city council of Lafayette in charge and possession of the street, levee and banks of the river in front of plaintiff's property, and ordering him to remove all obstructions and the incumbrances he had placed on the disputed premises. He appealed.

This case was argued by Mr. *Strawbridge*, for the plaintiff; and by Mr. *Preston*, for the defendants.

Mathews, J. delivered the opinion of the court.

This is a possessory action, in which the plaintiff alleges that he is, and has been for more than one year previous to the commencement of the present suit, in peaceable possession of a lot of ground, situated in the Nuns faubourg, formerly so called, now the city of Lafayette, &c.; and that he has been disturbed in his possession by acts of the defendants. He prays that they may be enjoined from further disturbance and for damages. Judgment was rendered in the court below for the defendants, from which the plaintiff appealed.

The disturbance took place by directions of the constituted authorities of the city of Lafayette, who claim the use of the land in dispute for public purposes. It is a slip of about twenty-five feet wide and two hundred and fifty long, and is shown by the evidence to be between the highway or street in front of the city aforesaid, and the levee, and directly in front of plaintiff's lot, &c. The record affords proof that he had been in peaceable possession of these premises, for the space of ten or twelve years previous to the disturbance now complained of.

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In a possessory action, the parties are precluded from going into an inquiry of titles; and the defendant will not even be permitted to show that the disputed premises is a public place or port, destined to public use.

When the evidence shows that the *locus in quo* does not cover the high road, a street, levee or tow-path, and is consequently subject to private ownership; whether the plaintiff be the real owner or not; or whether the premises in dispute be public or appropriated absolutely to public uses? are questions not permitted by law in possessory actions.

The court below went into a long investigation of titles under which the respective parties claim both in relation to property and right of use on the part of the defendants, and finally concluded that the lot in dispute was destined for public use, and could not be legally possessed by any individual of the community. We are of opinion that there is error in the proceedings below, by going into an inquiry of titles in the present action: it is simply possessory. The testimony shows, that the *locus in quo* is not a part of the high road or street; neither does it cover the levee or tow-path; consequently it may be the subject of private ownership, and whether the plaintiff be the real owner or not, whether the place in dispute be public or appropriated absolutely to the use of the public? These questions depend on an investigation of titles, which would cause a delay in the administration of justice not permitted by law in a possessory action. See the *Code of Practice*, art. 47 to 49, and from 53 to 58 inclusive.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed: and it is further ordered, adjudged and decreed, that the plaintiff be quieted in his possession of the lot of ground in dispute; and that the defendants be enjoined from disturbing him in his possession by digging up the earth, planting posts, or in any other manner; reserving to them the right (if any they have) to bring a petitory action or to institute any other legal process for the purpose of establishing the rights by them claimed in favor of the city of Lafayette, or of the public in general. The defendants and appellees are condemned to pay costs in both courts.

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June, 1834.

PRESTON vs. DAYSSON ET ALS.

PRESTON
vs.
DAYSSON ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

According to the act of the legislature, passed the 13th March, 1827, concerning protests of bills and notes, whenever the notary certifies, that, after diligent inquiry for the residence of the party intended to be charged by notice, he is unable to find it, and has lodged the notice in the nearest post-office, addressed to him at the place where the contract was made, it is deemed equivalent to personal notice.

Of the fact stated in the notary's certificate, that due diligence was used by him, to find the residence of the party, but in vain, and of the notice being deposited in the post-office, the certificate itself, must be taken as *prima facie* evidence.

The nature and degree of the diligence used by the notary, to find the residence of the party, on whom notice is to be served, may be inquired into, and if in point of fact, he did not use *due diligence* to obtain the necessary information, then the presumption arising from his official certificate will yield to contrary proof.

The statute passed by the legislature, does not change the usage or rule of the commercial law, in relation to the diligence to be used, in serving notices of protest, but merely provides a new mode of proof of such diligence.

When the statute speaks of *due diligence*, without defining in what it shall consist, it refers necessarily to the existing rule, according to commercial law or usage.

If the holder of a bill uses reasonable diligence to discover the residence of the endorser, notice given as soon as this is discovered, is *due notice* of the dishonor of the bill, within the usage and custom of merchants.

The holder of a bill or note ought not to avail himself of the ignorance of the notary, as to the residence of the endorsers.

The plaintiff alleges that one Lasalle, on the 23d of July, 1832, executed his note for three hundred and thirty dollars ninety-four cents, payable four months after date, to the order of one Plotz, who endorsed it to Madame veuve Daysson, who endorsed it to the petitioner. That said note

EASTERN DIST. WAS presented for payment, protested, and due notice thereof given to the endorsers, who have all become liable for the payment thereof. He prays judgment accordingly.

FRESTON
VS.
DAYSSON ET ALs.

Madame Daysson alone made a defence. She admitted her endorsement on the note, pleaded the general issue, and denied specially, having ever received notice of protest.

The note and protest were given in evidence. The protest bears date the 26th November, 1833, and the certificate of the notary, also in evidence, states that he notified the defendant (veuve Daysson) of the protest by *letter* addressed to her, dated on the day of said protest, and served on her this day, by depositing the same in the post-office in this city, directed to her, *not having been able to find her, after due and diligent inquiry.*

Parole evidence was given to rebut the presumption in the notary's certificate of due diligence being used, without effect, to find the defendant's residence. The notary did not make the inquiry himself. One of his clerks was sent with the notice. He swears he called at the store of the drawer and the payee and endorser of the note, but could not obtain information of the residence of Madame Daysson, to deliver the notice. On reporting this fact to the notary, he was directed to deposit the notice in the city post-office, directed to her, in pursuance of the *act of 1827, p. 76.*

D. Seghers, witness for defendant, says that Mr. Tricou, who negotiated the note, and whose name was endorsed on it, was well acquainted with Madame Daysson's residence, and could easily have pointed it out to the notary. It is in evidence that defendant's husband kept a store, and this note was taken by her in payment of goods sold at private sale of her husband's succession. The note fell due the 26th November, 1833; notice was due to her next day. She was verbally informed on the 30th November of the protest, and received the written notice on the 2d December.

The district judge was of opinion that due diligence was not used to obtain the necessary information of the defendant's residence, and gave judgment in her favor. The plaintiff appealed.

Preston, in propria personâ, and for appellee. We have shown that due diligence was used to ascertain the place of defendant's residence, but in vain ; but being sued as endorser, she was duly notified of the dishonor of the note, through the post office. See *act of 1827, 1 Moreau, Digest, p. 96.*

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PRESTON
vs.
DANSON ET AL.

2. Neither the plaintiff or defendant were merchants, and could suffer no damage by a delay of six days, in receiving notice of the dishonor of the note.

3. The defendant, in consequence of the death of her husband, had rented out the ground floor, and retired from business into the upper story of her house, where her residence was unknown. Her business was all in charge of an agent, and she not known (being a woman,) to any but her agent or lawyer.

4. Notice through the post-office should be liberally construed, in a large city where there is such a heterogeneous, and so dense a population as in New-Orleans, in which our next door neighbor is often a stranger to us ; while the love and pleasure of literary correspondence, lead us constantly to the post-office for every kind of intelligence.

J. Seghers, contra, contended, that the notice in this case is insufficient. The sufficiency of notice sent by mail, is well established, when the person to be charged, resides in a different town or place, from that in which the note was presented for payment. But when he resides in the same place, notice must be personal, or left at his residence or place of business ; depositing it in the post-office, is insufficient. *Bayley on Bills, ed. 1826, p. 178, note a.*

2. When the party resides in the place where payment is demanded, notice of the dishonor must be given to him, at farthest, on the day following that of protest or dishonor. To those who reside elsewhere, it must be sent by the post on that or the following post day. 11 *Martin, 452. Bayley on Bills, 171.*

3. When a party's residence is unknown, due diligence must in general, be used to find it out. Inquiry should be made of some of the other parties to the note. *Bayley, 180, 181.*

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DAYSSON ET AL.

4. In this case the notary did not use due diligence, nor did he make inquiry as he should have done.

5. The third section of the act of 1827, does not apply to parties residing in the same place where the demand and dishonor of the bill takes place. It provides that the notary shall use *all due* diligence to obtain the necessary information as to residence of the party to be notified, which, in this case, he has not done.

Bullard, J. delivered the opinion of the court.

This suit is brought by the holder of a promissory note, against the endorsers; and the plaintiff alleges a regular demand of the drawer, protest for non-payment, and due notice to the defendant as endorser. The defendant denies all the facts in the petition, except her signature, and she specially denies having received notice of protest.

In support of the allegation that the defendant had been duly notified of the demand, and non-payment, the plaintiff gave in evidence, a notarial protest, in the usual form, with a certificate of the notary public thereto annexed, stating the manner in which the notices had been given to the other parties to the note. After stating in what manner the other endorsers had been notified, the notary says, that the defendant was notified "by depositing the one (letter) for *veuve Daysson* in the post-office in this city, directed to her, not having been able to find her, after due and diligent inquiry."

The effect we are to give to this certificate, as evidence of notice, depends on the construction of the act of the legislature, of the 13th March, 1827, entitled "an act to amend an act concerning protests of bills of exchange, and promissory notes," &c.

The first section of this act, provides "that all notaries, or persons acting as such, are authorised in their protests of bills of exchange, promissory notes or orders, for the payment of money, to make mention of the demand made upon the drawer, acceptor, or person on whom such order or bill of exchange is drawn or given, and of the manner or circum-

stances of such demand, and his certificate added to such protest, to state the manner in which such notices of protest, to drawers, endorsers, or other persons interested were served or forwarded, and whenever they shall have so done, a certified copy of such certificate and protest, shall be evidence of all the matters therein contained." The third section provides, that "whenever the residence of any such drawer, acceptor, endorser or others, shall be unknown to the notaries or others acting as such, and whenever, after using all due diligence to obtain the necessary information thereon, the said residence shall not have been found by said notaries or others, acting as such, then, and in that case, it shall be the duty of such notary or others acting as such, to put the notices of such protest in the nearest post-office, where such protest was made, addressed to such drawer, acceptor, endorsers or others, at the place where it shall appear by the face thereof, such bill of exchange or promissory note was drawn, and the same shall be deemed and considered as legal notice of such protest."

Whatever we may think of the policy of this act, as an innovation on commercial usages, we are bound to give effect to it, according to its true construction. We think the legislature intended to declare, that whenever the notary certified that after diligent inquiry for the residence of the party intended to be charged by notice, he could not find it, a notice had been lodged in the nearest post-office, addressed to him, at the place where the contract was made, it should be deemed equivalent to personal notice. Of the fact that such diligence was used, and such notice was deposited in the post-office, the certificate of the notary must be taken as *prima facie* evidence. The nature and degree of that diligence may be inquired into, and if it should appear that in point of fact, the notary did not use due diligence to obtain the necessary information, then the presumption arising from his official certificate, will yield to the contrary proof. The question, therefore is, whether the evidence offered by the parties, shows a want of diligence on the part of the notary to find the residence of the endorser.

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June, 1834.

PRESTON
VS.
RAYSON ET ALB.

According to the act of the legislature passed the 19th March, 1837, concerning *protests of bills and notes*, whenever the notary certifies that after diligent inquiry for the residence of the party intended to be charged by notice, he is unable to find it, and has lodged the notice in the nearest post-office, addressed to him at the place where the contract was made, it is deemed equivalent to personal notice.

Of the fact stated in the notary's certificate, that due diligence was used by him to find the residence of the party but in vain, and of the notice being deposited in the post-office, the certificate itself must be taken as *prima facie* evidence.

The nature and degree of the diligence used by the notary to find the residence of the party on whom notice is to be served, may be inquired into, and if in point of fact he did not use due diligence to obtain the necessary information

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then the pre-
sumption arising
from his official
certificate will
yield to contrary
proof.

The notary who was sworn as a witness, deposed, that he did not make the inquiries for the domicile of Madame Daysson himself, nor did he deposit the notice of protest in the post-office. That it was done by a clerk of his. That he is regular in sending all notices of protest to the post-office, when the persons to whom they are directed, cannot be found on the day after the protest is made.

The notary's clerk, F. B. Vinot, deposed, that he was employed to deliver the notices of protest to the different endorsers, and did so as stated in the certificate. That he made inquiry at the store of the drawer, and at that of the other endorsers, for the domicile of Madame Daysson, in order to deliver the notice of protest to her, but the persons in the house could not tell him where she lived. He reported this to Mr. Christy, who directed him to put the letter directed to Madame Daysson, into the post-office. On his cross examination, the witness stated, that he had no distinct recollection of putting this letter into the post-office, for Madame Daysson. Mr. Christy being re-examined, says, that he has a distinct recollection of giving the written notice of protest of the note sued on, along with others, to Vinot, in order to be put into the post-office.

On the other hand, S. Borel, the agent of the defendant, testified that the defendant resides in Royal-street, where she has lived for eighteen months; that she lived previously in Maine-street; that she does not now keep a store; her husband formerly kept a store, and died there; that she had hired out the room on the ground floor, and lives in the second story. He takes the defendant's letters out of the post-office for her; he took out the letter No. 1, on the 2d December; he had been at the office the day preceding inquiring for letters for the defendant, but there was none for her. He had no knowledge of her receiving any other notice, than that received on the 2d December.

The notice in the record, is dated November 26, 1833, and Vinot swears that it was put into the post-office on the same day. If that be true, it is of no importance at what period it reached defendant, provided due diligence had been used to

find out her residence, because the statute makes the putting of the letter into the office, constructive notice. The testimony of Borel is altogether negative; he inquired for letters on the 1st of December and there was none; but it does not appear, that he or any body else had inquired on the preceding days, from the 26th November, up to the 1st of December. This does not prove that the letter was not in the office. It may have been overlooked by the attendants, or not having been called for during the month of November, it may have been placed with letters to be advertised.

The defendant's counsel relies on the authority of *Bayley on Bills*, to show that when it is not known where a party lives, due diligence must in general be used, to find him out, and inquiry should be made of some of the other parties of the bill. *Bayley on Bills*, 180, 181.

It is shown in this case, that inquiry was made at the domicile of two other parties to this note, for the residence of the defendant, without effect. According to that authority, the diligence used was such as is considered sufficient by the commercial law. We are of opinion, that this statute has not introduced a new rule on this subject, but merely a new mode of proof of such diligence. We cannot assent to the proposition of the defendant's counsel, that the third section of the act referred to, does not apply to such parties as reside at the same place. The statute makes no exception, and indeed no such exception could have been contemplated, because the whole section rests on the hypothesis, that the residence of the party is unknown, and then the notice is directed to be given at the place where his obligation was contracted or rather where the bill was drawn. This note was drawn in New-Orleans, and that is presumed to be the residence of the parties.

When the statute speaks of due diligence, without defining in what that shall consist, it refers necessarily to the existing rule, according to commercial law or usage.

"The holder of a bill of exchange," says Chitty, "is excused for not giving regular notice of its being dishonored to an endorser, of whose place of residence he is ignorant, if he

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The statute passed by the legislature does not change the usage or rule of the commercial law in relation to the diligence to be used in serving notices of protest, but merely provides a new mode of proof of such diligence.

When the statute speaks of due diligence without defining in what it shall consist, it refers necessarily to the existing rule according to commercial law or usage.

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use reasonable diligence, to discover where the endorsers may be found ;” and Lord Ellenborough observed, “when the holder of a bill of exchange does not know where the endorser is to be found, it would be very hard if he lost his remedy, by not communicating immediate notice of the dishonor of the bill, and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of

If the holder of a bill uses reasonable diligence to discover the residence of the endorser, notice given as soon as this is discovered, is due notice of the dishonor of the bill within the usage and custom of merchants.

The holder of a bill or note ought not to avail himself of the ignorance of the notary as to the residence of the endorsers.

passive and contented ignorance, but if he uses reasonable diligence to discover the residence of the endorser, I conceive that notice given as soon as this is discovered, is due notice of the dishonor of the bill, within the usage and custom of merchants.” *Chitty on Bills*, 276.

According to our view of the law, and the evidence in the case, the endorser is not released from her liability. It is true, the holder of the paper ought not to avail himself of the ignorance of the notary, as to the residence of the endorsers, but there is no evidence to show that the holder knew where she resided.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that the plaintiff recover of the defendant, three hundred and thirty dollars and ninety-four cents, with interest at five per cent., from the 26th of November, 1833, and costs in both courts.

MURPHY vs. BEZOUT.

APPEAL FROM THE PARISH COURT FOR THE PARISH OF IBERVILLE.

Where an appeal was taken from a parish in the Fourth Judicial District, to the Eastern District of the Supreme Court at New-Orleans, and made returnable on the first Monday in January, when there was time to have returned it to the November term preceding : on motion of the appellee, the appeal was dismissed as being irregularly taken.

An agreement of the appellee, endorsed on the record, that the cause be postponed to the next term for trial, does not amount to a waiver of his exception, to the irregularity of the appeal.

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The plaintiff alleges, that at a public sale by the inspector of roads and levees, for the Ninth District, in the parish of Iberville, made on the 3d March, 1832, he became the lowest bidder of certain works and repairs ordered to be done, on the front of the defendant's plantation, at twenty-five dollars per arpent. That the whole distance was twenty-five arpents, which he has repaired according to contract, and amounts to the sum of six hundred and twenty-five dollars, which he has demanded of the defendant, and which she refuses to pay. He prays for an order of seizure and sale of the land of the defendant to pay his said claim.

The defendant pleaded a general denial; and that she resided out of the parish; that she had no notice of the order and adjudication of the repairs required, and that the work was not performed by the defendant according to law.

The plaintiff had judgment for the amount of his claim, and that the premises which were repaired, be seized and sold to satisfy the judgment.

The defendant prayed an appeal, *returnable on the next term of the Supreme Court.*

On the 10th September, 1832, the parish judge granted the appeal, on the appellant giving bond and security as the law required, *returnable in the Supreme Court, on the first Monday in January next.* The transcript was filed with the clerk of the Eastern District, at New-Orleans, on the 7th January, 1833.

Labawe, for the plaintiff and appellee, moved to dismiss the appeal on the following grounds:

1. The return day of the appeal was improperly fixed, and the appellee was therefore illegally cited in court. He should have been cited for the November or December term of the court, and not for January term.

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2. The judge who granted the appeal, failed or omitted to fix the amount for which the appeal bond was to have been given, as required by law.

Cuvillier, contra. The appellee cannot now move to have this appeal dismissed, after having appeared and agreed to have the cause fixed for trial, on the first Monday of March following the return of the appeal.

2. The agreement to try the cause at a future day, was a waiver of the exception to the return day of the appeal.

3. If an error was made in fixing the return day of the appeal, it is no fault of the appellants. We prayed in our petition, that the appeal be made *returnable on the first term of the court.*

Where an appeal was taken from a parish in the 4th Judicial District, to the Eastern District of the Supreme Court at New-Orleans and made returnable on the first Monday in January, when there was time to have returned it to the November term preceding: on motion of the appellee the appeal was dismissed as being irregularly taken.

4. The error (if any) was committed by the judge *a quo*, who made the appeal returnable on the first Monday in January, instead of the last Monday of November. He certifies and gives as a reason for so doing, that similar returns were made by the district judges for the parish of Iberville, at the suggestion of the members of the bar, in consequence of the Supreme Court having fixed the January and March terms for the hearing of appeals, from the Fourth Judicial District.

Bullard, J. delivered the opinion of the court.

The appellee moves to dismiss this appeal on the ground, that it was made returnable at the January term, whereas it should have been made returnable in November.

The order of the judge was given on the 10th of September, and the next term was that of November last.

An agreement of the appellee endorsed on the record that the cause be postponed to the next term for trial, does not amount to a waiver of his exception to the irregularity of the appeal.

But it is contended by the appellant, that this irregularity has been caused by an appearance in this court, and an agreement by the appellee, endorsed on the record, that the case be postponed till March term. The court is of opinion, that this does not amount to a waiver of his exception to the irregularity.

It is therefore ordered, that the appeal be dismissed at the costs of the appellant.

GROUX ET ALS. f. p. c. vs. ABAT'S EXECUTORS.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
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Where colored persons have been treated with as *free*, in a certain transaction or compromise, their freedom and capacity to enter into such an engagement, cannot afterwards be questioned, by the other party, with a view of avoiding the contract, on the ground that they were slaves; much less for the purpose of depriving them of the common privilege of all parties to a contract, i. e. that of contesting its validity, on the score of error and fraud.

The executor is bound to administer on all the property of a succession which is expressly declared in the will by the testator to form a part of his estate; even on property claimed by an adverse title, unless inhibited by competent authority.

Persons claiming as legatees under a will, cannot set up title to property under an anterior sale and conveyance, which is expressly declared in the will to form a part of the estate of the testator.

A transaction entered into on the part of minors, duly represented, and made according to the forms of law, will cure defects in a judgment which was not conclusive, and against which the minor might otherwise be relieved.

Where the curator *ad bonas* of a minor above the age of puberty, purchased property for the use and in the name of his ward, at the sale of his father and mother's estate, and during his minority in an action of partition he is charged with his share of the estate thus purchased and received, by a judgment of the Probate Court: In an action to set aside the purchase, as having been made without his concurrence and consent: *Held*, that he was precluded by the judgment of the Probate Court so long as it stood unreversed.

Where the price of minors' property has been received by their tutor, and placed to their credit on a tableau of distribution of the tutor's estate, which is homologated by a judgment of the Probate Court, and is unappealed from, the minors are precluded from setting up title to the property itself, so long as the judgment of homologation subsists, showing they have received the price.

EASTERN DIST. Transactions have, between the parties, the authority of the thing adjudged ;
June, 1854. and where the parties compromise generally on all differences, the
GROUNX ET AL. titles which are unknown and afterwards discovered, are not cause for
 f. p. c. rescinding the transaction, unless they have been concealed purposely by
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And where the renunciation of all claims and demands, in an act of compromise or transaction, is full and explicit, and no mention is made of a latent title to certain property included in the transaction, but no evidence showing that the title was concealed on purpose by the party, the transaction will not be rescinded.

Judgments rendered by courts of competent jurisdiction, against minors duly and legally represented, so long as they are not reversed or declared to be null, have the same force and validity as if the parties were of full age.

In an appeal where security is given merely and expressly for costs, the execution of the judgment below is not suspended thereby : it is not a suspensive, but merely a devolutive appeal.

An injunction bond given at the inception of the suit, cannot be cumulated with the appeal bond given in the same suit on appeal.

The present suit commenced by injunction. The record shows, that on the 7th January, 1833, the executors of Antoine Abat obtained an order of seizure and sale against the present plaintiffs, who are the acknowledged natural children and heirs of Jean Grounx, deceased, for the sale of a house and lot of ground, on the corner of Rampart-street and the Bayou road, in virtue of a certain deed of compromise or transaction, entered into the 3d October, 1832, between the said heirs, represented by their tutor and co-heir, Jean Baptiste Grounx, f. m. c., and the executors of Antoine Abat ; which said house and lot of ground was confirmed to the heirs of Grounx for the price of four thousand nine hundred dollars, and mortgage retained, with the express provision that if the price was not paid on the 31st of December following, the property should be seized and sold.

On the 17th day of January, 1833, the present plaintiffs, by their under-tutor, J. Monroe, f. m. c., filed their petition and opposition to the order of seizure and sale, in which they

allege that since the execution of the transaction or compromise of the 3d October, 1832, they have learned that the house and lot of ground in contest was originally their property, and belonged to them at that time, in virtue of an act of sale passed the 21st January, 1818, by their natural father, in which he conveyed said property to their natural mother, and in trust for their use and benefit, in consideration of the sum and for the price of five thousand dollars. They further allege that, being ignorant of said sale and title to said property, their tutor and representative in said transaction was induced to accede thereto through error, and bind them for the price of four thousand nine hundred dollars as a new purchase of said property. They specially charge that this title was withheld, and not set forth and made known by the executors of Abat, who had charge of their natural father and mother's business at the time of signing the said transaction; and that the same was executed on the part of these plaintiffs through error, on the one hand, and obtained by unlawful means on the other.

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1. They pray that they may be declared to be the true and lawful owners of the property in contest, in virtue of the act of sale dated the 21st January, 1818.

2. That the said transaction or compromise be declared null and void as regards the engagement requiring them to pay to Abat's executor four thousand nine hundred dollars, as the price of said property.

3. That their tutor and co-heir who signed the transaction, be prohibited from paying said sum of four thousand nine hundred dollars.

4. That under the articles 303 and 739, No. 6, of the Code of Practice, relative to acts obtained by unlawful means, they pray for an injunction to stay all proceedings under the order of seizure and sale.

5. That under the articles 739 and 740 of the Code of Practice, they pray that their under-tutor, by whom they institute this suit, be dispensed with giving security; and that Jean B. Grounx, f. m. c., their tutor, and the executors of Abat, be cited to answer their petition; that the transaction

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of the 8d of October, 1832, be annulled, and that in the mean time all proceedings under the order of seizure and sale be enjoined.

Abat's executors excepted to the form of the plaintiffs' opposition to their order of seizure and sale, as being contrary to the article 738 of the Code of Practice. They deny generally the allegations of the plaintiffs, except the execution of the transaction or act of compromise; and deny specially that it was made or obtained either in error or by unlawful means, which charge is slanderous, and should be struck out. They allege, that at the time of the compromise or transaction, the pretended deed of sale of the 21st January, 1818, was well known to all parties to be a nullity, and was not, therefore, deemed necessary to be noticed or mentioned; that it was null and void, for the following reasons:

1. As a sale, it was without consideration and a disguised donation.

2. As a donation, it contained conditions contrary to good morals.

3. It was not recorded with the recorder of mortgages.

4. As a donation, it exceeded the disposable portion.

5. The donor subsequently declared in his will that the said sale was intended as a mere donation.

6. The parties to said act of sale, viz: the natural father and mother of the plaintiffs, have by a subsequent act, dated the 24th February, 1821, acknowledged and declared that said sale was feigned and simulated, and that it is hereby annulled and avoided.

7. Because the property claimed by the plaintiffs as minors in virtue of said sale, was inventoried and sold by order of the Court of Probates, as a part of the succession of Jean Grounx, deceased, their natural father.

8. Because in the settlement of said succession, the plaintiffs received their full share of the *price* of the very property they now seek to recover under the said pretended sale.

9. Because at the time of executing the act of sale of the 21st January, 1818, the plaintiffs were slaves, and incapable of acquiring property by purchase or donation.

J. B. Grounx, tutor of the plaintiffs, appearing adversely, answered and prayed, that the deed of transaction be declared good and maintained in full force between the contracting parties; and that the executors of Abat make good the title to the property in contest, in pursuance of the obligation contracted in said transaction.

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He further prayed, that in case said property should be decreed to belong to said minors in virtue of the sale of the 21st January, 1818, that Abat's executors be ordered to pay the value thereof to him; and that he be dispensed from paying the price as agreed on in said transaction.

The two causes, viz: the case of the order of seizure and sale by Abat's executors, against the present plaintiffs, was consolidated with the present suit, and both tried together.

The plaintiffs were ordered to give security in the sum of two thousand dollars, before they could proceed with the injunction suit.

Upon these pleadings and issues, the parties went to trial. The plaintiffs relied on the act of sale of the 21st January, 1818, by their natural father, of the property in question, in which he acknowledges that he sells and conveys the same to Marie Adelaide, f. w. c., and the mother of the plaintiffs, who was present, accepting said sale for her children, who were all minors. Grounx, in the same act, acknowledges the said minors to be his natural children by the said Adelaide.

Abat's executors showed, by parole testimony, that this act of sale was well known to both parties at the date of the deed of transaction, and that the plaintiffs had been advised by counsel that it was a nullity. They introduced in evidence the transaction itself, in which both parties, being duly represented, settled and compromised all their difficulties, rights and law-suits up to its date, the 3d October, 1832. Grounx in his will, which was written in 1819 (also in evidence), acknowledges the plaintiffs to be his natural children, and gives them the right to take the property now in contest at its estimated price in the inventory, in lieu of certain legacies which he leaves them. In February, 1821, Grounx and Adelaide both signed a notarial act, in which they

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declared the act of 1818, under which the plaintiffs now claim, simulated, that no price was ever paid or intended to be paid, *and they cancel it*. This act was produced in evidence. Abat was appointed dative executor of the succession of Grounx, after his death in 1823, under the will which was established and ordered to be executed. The property now in contest was inventoried at five thousand dollars, was sold at public sale by the register of wills for four thousand nine hundred and fifty dollars, the net proceeds being four thousand eight hundred dollars; one half or two thousand four hundred dollars, was paid over by the executor to Adelaide, the natural tutrix and mother of the plaintiffs, for their use and as their share of their natural father's estate under the will. Adelaide afterwards made a surrender of her property, and put her children on her bilan as privileged creditors for the sum of two thousand four hundred dollars, received from their father's estate. This sum was also put on the tableau of distribution to their credit, which was duly homologated by a judgment of the court. The evidence further showed that the plaintiffs, or some of them, received their portion of this money.

The parish judge considered the act of sale under which the plaintiffs claimed, as a *nullity*; that it was cancelled by the act of the parties afterwards, which rendered it unnecessary to go into an examination of the validity of the transaction or compromise. He gave judgment for the executors of Abat, and dissolved the injunction.

Judgment was signed on the 6th May, 1833. The plaintiffs presented their petition, and prayed an appeal to the Supreme Court, on their giving security in such sum as the court might direct *for the costs of the appeal*. On the 11th May the judge granted the appeal, and required the appellants to give security in the sum of *one hundred and fifty dollars*, returnable to the *third Monday of the next month*.

On the 20th May, *D. Seghers*, counsel for Abat's executors, obtained an *alias* order of seizure and sale against the disputed premises, on showing to the court that the judgment dissolving the injunction, had been notified to the plaintiffs

more than *ten days*, and that the appeal was only *devolutive*, security being given *for costs only*.

Magnin, counsel for the plaintiffs, took a rule on Abat's executors, to have the above order set aside, on the ground that the appeal, having been taken within ten days from signing the judgment, was *suspensive*, especially as the plaintiffs had given security in the injunction in the sum of two thousand dollars, which bond was still in force. On the 22d June, judgment was rendered on the rule, maintaining the *alias* order of seizure and sale. From this judgment the plaintiffs also appealed, giving security *for costs only*.

Magnin, for the plaintiffs. The decision of this case depends principally on two questions:

1. Were minors Grounux free, at the date of the sale of January, 1818, to their mother, for their benefit, of the property in question; and, secondly, is this sale valid?

2. The plaintiffs were free, because their mother was emancipated in 1804, long before their birth; they were consequently born free, and baptized as free-born. In all these proceedings, they are treated as free persons of color.

3. We contend that the act of 1818, whether considered as a sale or donation, vested the property in the minors Grounux, which none of the subsequent acts of the parties could divest, either in attempting to rescind it as a sale, or revoke it as a donation.

4. The right to said property being vested in the minors Grounux, by said sale, and never being divested, continued to be their property at the date of the transaction or compromise.

5. The clause of the deed of transaction, which stipulates that the minors should pay a *price* for their own property, is not binding on them; because there is error in the motive. It is a nullity, and fraudulent as to them. *La. Code*, 1818, 2418, 1824, 5, 6, and 1875 and 6.

6. Two judgments have been rendered in this case; the second maintaining the *alias* order of seizure and sale of the property in dispute, notwithstanding the appeal taken from the first judgment, in the manner directed by law, to make it *suspensive*.

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7. The court below erred in granting the *alias* order, until the appeal from the first judgment was decided.

D. and J. Seghers, for Abat's executors and the appellees.

1. The donation by the late Grounx to his natural children, could not exceed the disposable portion, and the value of the property thus disposed of, was to be determined at the time of the donor's decease. This has been done. The lot of ground now claimed by the natural children of Grounx, was inventoried and sold, together with the other property of the said Grounx. The proceeds were divided between his sisters and his natural children; and by a final judgment of homologation, his natural children, *duly represented*, have received two thousand four hundred dollars, which was their share and all they could claim in their father's estate. This point is *res judicata* with regard to them, because the validity of a court of competent jurisdiction, cannot be examined collaterally by the parties thereto, or those who claim under them.

2. The same rule applies likewise to the judgment homologating the tableau of distribution of Adelaide Grounx's estate. Abat was her syndic, and the minors Grounx, *duly represented*, were parties to this suit. The said judgment is, therefore, *res judicata*, as to them; and it will be observed that among the property she surrendered to her creditors, was, first, this very lot which she had bought from Galez, who purchased it at the probate sale of the succession of Jean Grounx; and, secondly, a family of slaves belonging to her, and which Abat bought for her children, viz: for the minors Grounx, the present claimants.

3. The transaction or *compromise*, to which they were parties and *duly represented*, explains in the most satisfactory manner, that the two thousand four hundred dollars, coming to the minors Grounx, as their share in their father's estate (it being the amount of the disposable portion), never was in Abat's hands. The said disposable portion was first paid to their mother and natural tutrix.

4. When she failed, the said sum was employed by Abat in the acquisition of a family of slaves, which slaves are acknowledged by the above minors, in this very compromise, to have always been in their possession. The said slaves made no part of Grounx's estate, as it has been erroneously asserted, but belonged to Adelaide Grounx, the mother of said minors, before her failure, and were surrendered by her to her creditors.

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5. The lot of ground now claimed by the minors of Grounx, cannot, therefore, be restored to them, since they have received from their natural father, all they could claim, viz: the disposable portion. If the contrary doctrine could prevail, the minors Grounx would receive at once *the price and the thing*; which would lead to an absurdity.

6. The appellees further contend that, notwithstanding the pretended discovery of the pretended deed of sale, which in fact was never concealed except by the appellants themselves, the transaction or compromise must, nevertheless, prevail, under the provisions of the *La. Code*, art. 3050.

Fourchy, for J. B. Grounx, tutor to the plaintiffs, urged that the motives which induced the execution of the deed of transaction, were to avoid a law-suit which was about to be commenced against Abat's executors, for damages sustained by the minors Grounx, arising from unfaithfulness in Abat's different stations of attorney in fact of Grounx, as dative executor of Grounx's estate, as syndic of Adelaide's creditors, and as syndic of the creditors of Rosileitte Pradere, who was indebted to the estate of Grounx.

Preston, for the plaintiffs, and in reply.

1. The plaintiffs made opposition to the seizure and sale obtained by Abat's executors, on the ground that the land belonged to them by a sale from Jean Grounx, their father, to their mother, Marie Adelaide, for them, by a deed dated the 21st of January, 1818. Some of the records show 29th, instead of 21st; but this is an error. They base their opposition upon art. 2418 of the *La. Code*.

2. To their opposition it is seriously urged, that they were slaves on the 21st January, 1818, and therefore incapable of

REASON DONT. acquiring property from their father, Jean Grounx. If they
June, 1834. were slaves in 1818, they are so still, as no subsequent act of
GROUNX ET AL. emancipation has been produced.

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3. The executors of Abat are estopped from making this defence, because if the plaintiffs are slaves, incapable of making opposition to legal process, they are equally incapable of being proceeded against. If by reason of their slavery in 1818, they could not acquire property, their condition has not been altered so as to contract an obligation in 1832.

4. Again, there is no proof that they are slaves. An act of emancipation of their mother is produced; but neither the mother nor her children were parties to it, and are not, therefore, proved by the act to have been slaves.

5. The minors Grounx, being the children of Jean Grounx, were enfranchised by the mere act of treating them as freemen without any formality whatsoever. 4 *Partida*, tit. 22, law 2. *Institutes*, book 1, tit. 5, l. 1.

6. The act of the 21st of January, 1818, is a sale of the property in question to the minors Grounx. *Civil Code*, 263, art. 21. 5 *Martin*, N. S. 633. This sale has never been annulled by suit as fraudulent, and could be annulled only by creditors. *La. Code*, 1973, 1988. But there were no creditors. The suit to annul it, moreover, is prescribed. *Ibid.* 1989.

7. This act was not a disguised donation, because it has not been proved to be such: it has not been attacked as such; it could only be attacked by forced heirs. *La. Code*, art. 2419.

8. If the act of the 21st of January, 1818, transferred the property to the minors Grounx, the sale to them of the same property by the transaction is null, and the price not recoverable. *La. Code*, art. 2418.

9. There was no transaction on the act of 1818, for it was either not exhibited at all, or was regarded by the family meeting as a nullity. If it was not exhibited at all, or being exhibited was treated as a nullity, the transaction was made as to it, entirely in error; and is not, therefore, binding upon the minors Grounx. *La. Code*, arts. 1818, 1819, 1835.

10. If the property was transferred to the minors Grounx, by the act of 1818, they have never been divested of it, and could not be by the acts of Grounx or Adelaide afterwards.

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11. It is said, finally, that the children of Jean Grounx have lost their recourse upon this property, by sharing its proceeds as his testamentary heirs; that they cannot have the price and the thing. They were not testamentary heirs; but only *legatees* of one-half of his estate. Their legacy cannot be reduced on account of debts, and can only be reduced by an action in behalf of the forced heirs. *La. Code*, 1491.

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12. By the settlement of Grounx's succession, their mother is made to receipt to Abat, as dative executor, for two thousand four hundred dollars; and by Abat's account, as syndic of her creditors, nearly the same sum is brought in as a privilege credit in favor of the children. But, by the compromise, it is seen that the two thousand four hundred dollars had never been paid, and the executors transfer in payment of that sum a family of slaves.

J. Seghers, for appellees, in conclusion.

1. The second judgment appealed from, and maintaining the execution of the order of seizure and sale, notwithstanding the appeal, is correct, because security is only given for costs. The appeal is not *suspensive*.

2. All the facts we have alleged, as actual owners of the lot in question, when we conveyed it to the plaintiffs by the act of compromise, are to be found in the record. The appellees are subrogated to the right of the forced heirs of Grounx, who have received the price. They are in fact the assignees of those heirs.

3. As to the family of negroes mentioned, there is neither proof nor allegation on record of the pretended ownership of the late J. B. Grounx. There is, on the contrary, evidence of the slaves having been the property of *Adelaide*; for it appears those slaves were surrendered by her to her creditors; and on this point, the judgment of homologation of the tableau of distribution is *res judicata* against the appellants.

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Bullard, J. delivered the opinion of the Court.

The controversy in this case, grows out of a transaction or compromise, entered into between the minors Grounx, natural colored children of Jean Grounx, deceased, and the testamentary executors of Antoine Abat. This compromise, made in pursuance of the advice of family meetings, on both sides, recites that Antoine Abat, having been in his life-time, successively, the attorney in fact of their natural father, dative executor of his last will, syndic of the creditors of their natural mother, Marie Adelaide, a f. w. c., and finally syndic of the creditors of Rosillette Pradere, a debtor of their father; and difficulties having arisen on the part of the said natural children, touching the manner in which Abat had performed these different successive duties, and a law-suit, being about to be instituted by them, against said Abat, in his life-time, a *projet* of a transaction had been drawn up, in order to terminate amicably, the differences existing between them, by which *projet* Abat was to *retrocede* to them certain property, and slaves, which had been the property of their father. Before this *projet* had ripened into a contract, by the final consent of the parties, Abat died. His executors then came forward, and with the advice of a family meeting, finally concluded the transaction on the 3d of October, 1832. It is therein stipulated, that the minors renounce every kind of reclamation, which they might have against the succession of Abat, on whatever account it may be, and particularly on account of any want of formality or other, whatever, in the acts of the different administrations above mentioned. The executors, on their part, transfer to the minors, a family of slaves, and a certain lot, and the improvements thereon, situated at the corner of the Bayou Road and Rampart-street. The price of the slaves, is declared to be the sum of two thousand four hundred dollars, due to the said heirs of Grounx, by privilege according to the tableau of distribution made by Abat, as syndic of the creditors of Marie Adelaide, their mother, for the share of those children, in the estate of their father, as appears by the executor's account of his administration of that estate, which sum remaining in the hands of

Abat, he had employed it in purchasing for them, the said family of slaves. They give a full and final acquittance and discharge of the sum thus due to them. The price of the property on the Bayou Road and Rampart-street, is declared to be four thousand nine hundred dollars, payable in December following, and secured by mortgage. The parties finally declare, that in consideration of this transaction, they remain mutually released, from all demands and claims *whatever, on whatever account they may be.*

The price of the lot of ground, not being paid when it fell due, the executors of Abat obtained an order of seizure and sale, and the minors Grounux, represented by their under tutor, made opposition, and obtained an injunction, on the grounds, that the lot and appurtenances were, at the time of the transaction, already their own property, by virtue of a sale, made by their natural father to them, on the 21st of January, 1818, passed before a notary public; that there was, therefore, error in the transaction, as they could not purchase, what was already their own, and that no mention is made in the transaction of the deed above recited. They conclude by a prayer that the property may be deemed to belong to them, in virtue of the act of sale of the 21st January, 1818, and that their tutor may be ordered, not to pay to the executors of Abat, any part of the price, and that the transaction may be declared null, so far as it relates to the sale of the aforesaid lot of land.

In their answer to this petition, the executors of Abat admit the transaction, but deny that it was entered into in error, or procured by unlawful means. They aver, that the act of the 21st January, 1818, was well known to all parties, at the time the transaction took place, to be a perfect nullity. They set out several grounds, on which they aver it is null and void. 1st. That it wanted consideration, and was evidently a disguised donation. 2d. As a donation it contained conditions contrary to good morals. 3d. It was not recorded with the recorder of Mortgages. 4th. That it exceeded the disposable portion of the donor's estate. 5th. That it was afterwards acknowledged and declared by the donor, to be a mere donation in his testament of the 5th October, 1819.

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6th. Because the natural father and mother, afterwards in 1821, by notarial act, declared said act to be feigned and simulated, and they expressly annulled and revoked it. 7th. Because the same property was afterwards inventoried, and sold by the Court of Probates, as a part of the succession of their natural father. 8th. Because in the settlement of said succession, the minors received their shares, of the price for which the property now claimed, was sold ; and 9th. Because the said minors were slaves, at the time of the pretended purchase and incapable of contracting.

The act of sale or donation, out of which this controversy has arisen, is in substance as follows. Grounx, the natural father of the plaintiffs, acknowledges that he sells and conveys to Marie Adelaide, f. w. c. present and accepting as purchaser for her children by name, all minors under the age of puberty, the lot of land in question, for the price of five thousand dollars, which he acknowledges he has received out of the view of the notary and witnesses, renouncing the exception of *non numeratâ pecuniâ*. He acknowledges that the children are his natural children, by the said Adelaide. The usufruct of the property, is expressly reserved to Adelaide during her natural life, but it is stipulated, that at her decease, the property shall pass, of right to the said minors, to be by them holden jointly, or to be divided in equal portions among all the children of Adelaide, who shall have been duly acknowledged by the vendor, at the time of his death.

Two questions are presented by the pleadings for the consideration of the Court. 1st. Did the minors Grounx, acquire a title to the lot of land, by the contract above recited ? and 2d. If so, has their title been divested by the sale of it, which was provoked by Abat, as a part of their father's estate, by their claiming and receiving a part of the price, as testamentary heirs, in virtue of a judicial decree, and finally by the transaction in question ?

Where colored persons have been treated with as free in a certain transaction or compromise,

We leave out of view, altogether, the question which is raised, touching the liberty of these minors. Having treated with them as free, the representatives of Abat could not be received to question their capacity, with a view of

avoiding the contract, as relates to the succession, much less for the purpose of depriving them of the common privilege of all parties to a contract, that of contesting its validity, on the ground of error or fraud.

The view which the Court has taken of the second question, renders it unnecessary to decide, what rights were acquired by the minors, in virtue of the act of January, 1818. Assuming, that on the death of their mother, they would have been entitled to the property as purchasers, or as donees, of their natural father, we come at once to the principal question in the cause, have they lost those rights by their own acts or consent, or are they precluded from enforcing them by any judgment of a Court of competent jurisdiction, which as to them, in relation to this property, has the authority of the thing adjudged ?

In 1821, Grounux, and Marie Adelaide, went before a notary and declared that the act above referred to, was a simulation ; that no price was paid, and that the vendor never intended to divest himself of his title, and they formally annul and cancel the contract. It is hardly necessary to state so plain a proposition, as that the title acquired by the minors, could not legally be divested, by such an act alone. Their mother had the capacity to acquire for her children, but she was incapable of annulling their title, by her mere consent.

In the course of the same year, Grounux made his last will and testament, which after his death, in 1823, was ordered to be executed by the Court of Probates. By this will, he acknowledges these same natural children by Adelaide, and declares, that, in order to provide for them the means of subsistence, according to the dictates of humanity, he bequeaths to them a moiety of all the property, moveable and immoveable, which he shall leave at his death, in case his two sisters, whom he institutes as his heirs, or either of them should survive him ; but in the contrary case, he gives them three-fourths, and in either case, he gives his natural children the right of taking, if they think proper, at the estimated value, stated in the inventory, the lot with the house and other buildings and appurtenances, *belonging to him, situated at the*

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their freedom and capacity to enter into such an engagement, cannot afterwards be questioned by the other party with a view of avoiding the contract, on the ground that they were slaves; much less for the purpose of depriving them of the common privilege of all parties to a contract, i. e. that of contesting its validity on the score of error and fraud.

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corner of the Bayou Road and Rampart-street, the same property now in controversy. The executors named in the will, declined to accept the charge, and Antoine Abat, was appointed dative executor. The lot above mentioned, was estimated in the inventory at five thousand dollars, and was sold at public sale, by the Register of Wills, for the sum of four thousand nine hundred and fifty dollars. According to the tableau, filed by the executors, the net proceeds of the estate amounted to four thousand eight hundred dollars, of which one-half appears to have been paid over to Marie Adelaide, as tutrix of their minor children, and the other half to the instituted heirs. The tutrix consented to the final homologation of the account, and the account of the executors was finally approved and homologated, by a judgment of the Probate Court, "*as consented to by all parties concerned.*"

This is one of the administrations, the irregularities or informalities of which it was the object of the transaction between these parties to cure. What were those irregularities and nullities, as relate to the minor legatees, and of which they had a right to complain? There occur to us, from an examination of the record only four: 1st. That the executor caused the lot in question to be inventoried, as a part of the estate, and disregarded their title by the deed of 1818, of which he had knowledge. 2d. That they had a right to take the property at its estimated value, in part or in lieu of their legacy, by universal title. 3d. That it was sold for less than its appraised value, and 4th. That the homologation of his account, was procured by the consent of their tutrix, and not pronounced contradictorily with them.

The executor is bound to administer on all the property of a succession which is expressly declared in the will by the testator to form a part of his estate; even on property claimed by an adverse title, unless inhibited by competent authority.

It is a sufficient answer to the first, that it was the duty of the executor to maintain the will, and as the lot in question was expressly declared by the testator, to form a part of his estate, the executors could not avoid administering upon it as such, unless inhibited by competent authority. 2d. and 3d. How could the minors complain that the property had been sold, and they deprived of the privilege of retaining it, on account of their legacy at its appraised value? The very right to retain it under the will, implies necessarily, that the

property belonged to the estate, and not to themselves. It is difficult to conceive, how they could claim, as legatees under the will, without giving up their own pretensions, to the property, by an anterior conveyance. The intention of the testator clearly was, to give them the disposable portion of his property, including, as a part of it, the lot of land and buildings, at the corner of the Bayou Road and Rampart-street. They cannot, at the same time, take their legacy and repudiate the will. Their tutrix acknowledges, that she had received for her children, the sum of two thousand four hundred dollars, one-half of the net proceeds of the estate, including the price of the lot in question. But it is objected 4thly, that the judgment of the Probate Court, approving the executor's account, was rendered by consent of parties. Admitting that this judgment was not conclusive; that the minors might have been relieved against it, it is clearly provided for by the transaction. If the expression used in the transaction; *De quelque défaut de formalité ou autre, que ce soit dans les actes de ses différentes administrations,*" do not comprehend all the above enumerated acts or omissions, we are at a loss to know to what they do apply.

But we come next to examine the administration of Abat, as syndic of the creditors of Marie Adelaide, the mother and tutrix of the plaintiffs. After she had received her children's share in their father's estate, she made a *cessio bonorum*. Among her creditors, she enumerates her children, represented by Nicolas Monroe, as curator *ad lites* for one of them, and under tutor for the rest, for two thousand four hundred dollars, for their inheritance in the succession of their father, by tacit mortgage, from the 22d May, 1824. The under tutor and one of the minors, personally assisted by his curator *ad lites*, appeared before the notary at the meeting of the creditors, swore to their claim as above described, and voted for syndic. A tableau of distribution was afterwards filed by Abat, as syndic, a rule taken on the creditors, to show cause why it should not be homologated, and finally no cause having been shown, was homologated by judgment of the District Court. This judgment appears on the face of it, to be binding on all the parties.

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Persons claiming as legatees under a will cannot set up title to property under an anterior sale and conveyance, which is expressly declared in the will to form a part of the estate of the testator.

A transaction entered into on the part of the minors, duly represented, and made according to the forms of law, will cure defects in a judgment which was not conclusive, and against which the minor might otherwise be relieved.

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Where the curator *ad bona* of a minor above the age of puberty, purchased property for the use and in the name of his ward, at the sale of his father and mother's estate, and during his minority, in an action of partition he is charged with his share of the estate thus purchased and received, by a judgment of the Probate Court: In an action to set aside the purchase as having been made without his concurrence and consent: *Held*, that he was precluded by the judgment of the Probate Court so long as it stood unreversed.

Where the price of minors' property has been received by their tutor, and placed to their credit on a tableau of distribution of the tutor's estate, which is homologated by a judgment of the Probate Court, is unappealed from, the minors are precluded from setting up title to the property itself so long as the judgment of homologation

The claim by the minors was necessarily composed, in part, of the price of the property, to which they now set up title, and which had been received by their tutrix from the executor of their father's will. It rests on the hypothesis, that the lot remained the property of their father, that it was disposed of by his will; that they acquiesced in the will and its execution, by receiving their legacy, representing one-half of the the estate in money; and it appears to the Court, wholly inconsistent with the pretensions of the plaintiffs to claim the lot in controversy.

In the case of *Martin vs. Martin's heirs, et als.*, the plaintiff was a minor over the age of puberty. His curator, *ad bona*, without his concurrence, purchased real estate and slaves, at the sale of his father and mother's estate in his name, on account of his share in the estate. During his minority, in an action of partition, in which he was represented by a curator *ad lites*, he was by judgment of the Probate Court, charged with his share of the estate thus received by his curator *ad bona*. He afterwards sued to set aside the purchase, as having been made without his concurrence and consent. But this Court held that he was precluded by the judgment of the Probate Court, so long as that judgment stood unreversed. 5 *Martin, N. S.* 165.

That case is strongly analogous to this, and we think the same principle will apply. While the judgment of homologation subsists, showing that they had received the price of the property in question, as a part of their father's estate, the minors are precluded from setting up a title to it as their own. This is indeed a much stronger case than the one quoted, because in that case, the Probate Court would have been without jurisdiction to decide on the authority of the curator *ad bona*, to purchase for his ward, if that question had been brought directly before it, and in this the District Court having general jurisdiction, was competent, in whatever shape the question may have been presented.

Thus far we have examined this question, in a great measure independently of the transaction or compromise, we have considered the rights of the parties in relation to the

property, mainly according to the evidence relating to the different administrations of Abat, sanctioned by judicial authority. We have looked at it, as if no such transaction existed, and this suit had been brought directly for the property, under the title of January, 1818. Let us examine how the matter stands under the compromise, and whether such error has been shown, as will vitiate the contract.

Transactions according to the Code, have, between the parties, a force equal to the authority of the thing adjudged, and when the parties have compromised, generally on all differences which they might have had with one another, the titles which they know nothing of, and which were afterwards discovered, are not a cause of rescinding the transaction, unless they have been kept concealed on purpose, by the act of one of the parties. *La. Code, arts. 3045 and 3050.*

The renunciation of all claims and demands in this act of compromise, is as general as words could well make it, and there is no evidence that the latent title of 1818, was concealed on purpose, by the executors of Abat. It has been said, that it was not taken into view at all. Admit that it was not. Still it is certain, that the parties had in view, the administration of Abat, as executor of Groun, and as syndic of the creditors of Marie Adelaide, and it must have been known to both parties, that the property now claimed, had been sold by the executor, as a part of the estate. There is one clause in the transaction, not a little remarkable, and which seems to us conclusive. The price of the slaves conveyed by the executors of Abat, is declared to be two thousand four hundred dollars, "due by privilege to said minors Groun, according to the tableau, of distribution, deposited in the District Court, by Mr. Abat, as syndic of the creditors of Marie Adelaide, for the share coming to said heirs, in the succession of their father, as appears by the account of said succession, rendered by Mr. Abat, before the Court of Probates, which sum had been received by said Marie Adelaide Groun, in her capacity of tutrix, according to her receipt in the Court of Probates." They go on to admit, that this sum had been employed in the purchase of the family of slaves, and they give a full

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submits showing
they have received
the price.

Transactions have between the parties the authority of the thing adjudged. And where the parties compromise generally on all differences, the titles which are unknown and afterwards discovered, are not cause for rescinding the transaction, unless they have been concealed purposely by one of the parties.

And where the renunciation of all claims and demands in an act of compromise or transaction is full and explicit, and no mention is made of a latent title to certain property included in the transaction, but no evidence showing that the title was concealed on purpose by the party, the transaction will not be rescinded.

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Judgments rendered by courts of competent jurisdiction against minors duly and legally represented, so long as they are not reversed or declared to be null, have the same force and validity as if the parties were of full age.

In an appeal where security is given merely and expressly for costs, the execution of the judgment below is not suspended thereby. It is not a suspensive, but merely a devolutive appeal.

An injunction bond given at the inception of the suit, cannot be cumulated with the appeal bond given in the same suit on appeal.

and final acquittance. This sum formed in part the price of the property now claimed, and after recovering the price, they cannot claim the thing.

Judgments rendered by Courts of competent jurisdiction, against minors, duly and legally represented, so long as they are not reversed or declared to be null, have the same force and validity as if the parties were both of full age. In the case before the Court, the judgment homologating the tableau in the *concurso* of Marie Adelaide, and that approving the account rendered by Abat as executor of Grounx, rest on the hypothesis, that the property in dispute, formed a part of the succession of Grounx, of which one-half was bequeathed to the plaintiffs, and it was adjudged, that they should receive one-half of the price in lieu of their legacy. The subsequent transaction adopted the same hypothesis, confirms the former judgments, cures all the irregularities and nullities in the administration of the estate, and has, as to all those matters, the authority in itself of the thing adjudged.

Upon the question, whether this appeal should be considered as suspensive, or merely devolutive, we agree with the judge *à quo*, that security having been given, merely and expressly for costs, the execution of the judgment below, was not suspended by the appeal. The injunction bond, given at the inception of the suit, cannot be cumulated with the appeal bond. The conditions of the two bonds, are essentially different. The security on the injunction bond, is not bound for any part of the judgment to be rendered on the appeal, except for damages; he is liable only for such damages as the party may have sustained, if it should appear that the injunction was wrongfully obtained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court, be affirmed with costs.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.

WESTERN DISTRICT.
BATON ROUGE, AUGUST, 1834.

VIDAL'S HEIRS vs. DUPLANTIER.

**APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.**

The Spanish law required as an indispensable solemnity to the validity of a testament or will, that it should be signed by the testator and witnesses, or by some one of the witnesses for him or them at least.

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The principle has been settled, that according to the Spanish law it is not absolutely necessary for the validity of a testament or will, that all the required solemnities should appear on the face of the testament itself; but that some apparent defects may be cured or supplied by proof, when the instrument was offered for probate.

VIDAL'S HEIRS
vs.
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In a petitory action, when the plaintiffs fail to show title in themselves, it will not be deemed necessary to inquire into the validity of the proceedings in pursuance of which the property was sold to the defendant.

This is a petitory action. The plaintiffs, Caroline and Maria, f. p. c., the natural daughters of Nicolas Maria Vidal, late auditor of war, &c. in the province of Louisiana; state

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that their ancestor died at Pensacola in 1806, and that in his last will and testament he instituted them, with two other natural children, who are not now known to exist, his *universal heirs*. That at his death the testator was owner and proprietor of five tracts of land lying principally in East Baton Rouge, amounting together to sixteen thousand arpents, which was granted to one J. B. Labatut by the Spanish government, in the year 1803 or 4; and by him conveyed to their ancestor. They further state, that Fergus Duplantier, of the Parish of East Baton Rouge, hath unlawfully taken possession of the titles to said land, and continues to withhold them from the petitioners, who are entitled to them in the absence of other legatees. They allege the value of said land titles, to be at least sixteen thousand dollars, and that they have amicably demanded them from the defendant, who refuses to deliver them: They pray judgment for the delivery of said titles to them, or their value in damages, as alleged, and costs.

The plaintiffs propounded two interrogatories to be answered by the defendant:

First, Have you or not, the Spanish grant for sixteen thousand arpents to J. B. Labatut, as described in the petition?

Second, What is the date of said grant?

The defendant answered: *First*, "I am in possession of a Spanish grant of sixteen thousand arpents, in five different tracts, &c., as described in the petition, which was issued by Juan Ventura Morales, Spanish Intendant, to J. B. Labatut. [*I am the legal and bona fide owner of said titles by regular chain of transfer, having paid the price thereof.*"]

Second, "The said grant bears date the 20th January, 1804."

The words in *italics and brackets*, in the first answer, were objected to by the plaintiffs' counsel as uncalled for, and stricken out by the court.

The defendant, in his answer to the merits, pleaded a general denial; and denied specially that the plaintiffs were heirs of Vidal, or entitled to any legal right under his will: He further states he is the legal owner of the tracts of land

claimed by the plaintiffs; having purchased them for the sum of six thousand dollars from one Perrin, through his authorised agent, by act *sous seing privé*, bearing date the 9th May, 1811. Perrin acquired said property by adjudication to him, on the 27th June, 1808, by Carlos Grandpré, Governor of the district of Baton Rouge, under a decree of the Spanish tribunal at Pensacola, for a debt of four thousand dollars, secured by mortgage, due by the estate of Vidal. He alleges he has been in the actual possession of a considerable portion of the land, ever since his purchase, and instituted suit for the remainder, when the plaintiffs failed to intervene therein, or assert any right thereto. He pleads the prescription of twenty years, and prays that the plaintiffs' demand be rejected, and that he be dismissed with his costs.

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The facts of the case show, that Nicolas Maria Vidal was auditor of war under the colonial government of Louisiana, when Gayoso was governor, and resided in New-Orleans. In 1798 he made his will by notarial act, before Pedro Pedesclaux, notary public, and three persons named as witnesses, *but does not sign himself*. In this will the plaintiffs are recognised, with two others, as the natural children of the testator, by a colored woman. Vidal left New-Orleans about the time of the change of government in 1803, and resided in Pensacola, where he died in 1806. The grants of land in controversy, were made by Morales the 20th January, 1804, to J. B. Labatut; and the sale from the latter to Vidal, was dated the 25th February, 1804. In June, 1827, the plaintiffs presented a petition to the probate judge of East Baton Rouge, in which they claim the possession of the estate of Vidal under the will, and pray to be recognised as universal legatees; that an inventory be made of the sixteen thousand arpents of land, and all the other property of Vidal's estate. A decree was rendered, in accordance with the prayer of the petitioners, contradictorily with an attorney appointed to represent the absent heirs. An authentic copy of the will was annexed to this petition, and made a part of the proceedings.

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August, 1834. by the defendant, on the ground that it had not been admitted to probate, and was never ordered to be executed; and that it was null and void, not being made according to law.

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The defendant offered in evidence, the *procès verbal* of the sale of the land in controversy, by Grandpré, upon which he relies as the foundation of his title. The decree ordering this sale, is dated the 6th May, 1808, and signed by the civil and military commandant of Pensacola and West Florida. It annuls a previous sale, made under a former order of the same tribunal, and orders a new one. It is stated in the decree, that the sale is ordered for the purpose of paying a mortgage creditor of the said estate. The decree and proceedings, of the Spanish tribunal at Pensacola, are only recited in the *procès verbal* of the sale made by Grandpré, which is alone in evidence. The plaintiffs' counsel objected to the admissibility of this document: *First*, because it purports on its face, to be the copy of a copy, and is not the best evidence the case admits: *Second*, that it is not legal evidence of a decree recited in it, for the sale of the lands: *Third*, that it does not correspond with the allegations of the answer, which refers to an original decree, for the sale of the land in contest: *Fourth*, it is not a full copy of the proceedings, but only an extract from the mortuary proceedings in the case of Vidal. The court overruled the objections, and admitted this document in evidence, to which decision of the judge, the plaintiffs' counsel excepted.

The adjudication of the land to Perrin, by governor Grandpré, is dated the 27th June, 1808. On the 9th of May, 1811, Perrin by his attorney in fact, sold and conveyed the premises to the present defendant.

The district judge was of opinion, the will was not properly admitted to probate; and that the defendant acquired a good title, under the decree and sale by the Spanish authorities, of the premises in contest. Judgment was rendered in favor of the defendant. The plaintiffs appealed.

Turner, for the plaintiffs.

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1. The title to the property sued for, is clearly shown to be in the plaintiffs, by the will of Vidal.

2. The defendant has shown no legal title whatever. His deed of sale by the agent of Perrin, cannot avail him.

3. This instrument is an act under private signature, not recorded at a time not suspicious, but after the institution of this suit, which tends to render it suspicious.

4. The power of attorney from Perrin to his agent, did not authorise the sale to the defendant.

5. The defendant, nor those under whom he claims, have ever had a title; the forms of law, have never been complied with. The property belonged to minors. The pretended adjudication has none of the requisites or formalities to divest minors of their title.

6. The document given in evidence by the defendant, should have been rejected, or if received, it was evidence only of the sale, and not of any judgment authorising the sale; nor of a family meeting with the previous formalities which the law requires, in order to divest minors of their title to property.

7. The price of adjudication has never been paid. The judgment could only, in the worst view for the plaintiffs, have been one of *non suit*.

R. & A. N. Ogden, for defendant.

The plaintiffs have failed to establish any rights as heirs of Vidal. The heirship is specially denied; and the will under which they claim, having never been admitted to probate, is null and void. They can derive no right from it.

2. The proceedings instituted in 1827, in the Probate Court, do not furnish evidence of probate of the will. They were irregular, and not done in the manner pointed out by law, and can produce no effect. *Civil Code*, p. 242 art. 153. *Ib.* 244, art. 162. *La. Code*, art. 1637, 1571. 3 *Martin*, N. S. 473. *Ib.* 458.

3. The plaintiffs cannot claim as the testamentary heirs of Vidal, because being natural children, they should have

WESTERN DIST. alleged and proven, that Vidal left neither descendants nor
August, 1834. ascendants. *Civil Law of Spain*, p. 114. 12 *Martin*, 390.

VIDAL'S HEIRS
VS.
DEPLAINTIFFS.

4. The defendant by his answers to interrogatories propounded to him by plaintiffs, established his right to the title papers sued for. The part of the answer objected to, was improperly stricken from the record. 11 *Martin*, 217.

5. The defendant has made out a perfect title. The order of the Spanish tribunal at Pensacola, decreeing the sale of the land, was rendered by a competent authority, and cannot now be inquired into. It is a domestic and not a foreign judgment, and the proceedings on which it is found, are not required to be shown. 1 *Martin*, N. S. 165. 4 *Martin*, 301. *Ib.* 311. *Ib.* 157.

6. The copies of the originals, which were deposited in the office of the governor at Baton Rouge, were properly received in evidence. 7 *Peters*, 6. *Ib.* 714, 16, 17 and 24. *Civil Law of Spain*, 328.

Pichot, for the plaintiffs, and in conclusion.

1. The petitioners are testamentary heirs of Vidal, and his succession was acquired to them from the moment of his death. See *La. Code*, art. 934.

2. Their being sent in possession of the sixteen thousand arpents of land, by judgment of the Court of Probates for East Baton Rouge, is legal, and its validity cannot be collaterally impugned before a District Court. See *Civil Code*, art. 78. 6 *La. Reports*, *J. P. Dupré vs. Widow C. Reggio et als.*

3. At the time of the death of Vidal, the petitioners were minors, and could be dispossessed of their rights, but by a strict compliance with the formalities required by the Spanish law: a tutor ought to have been appointed to them. See 6 *Partidas*, t. 16, l. 12.

He could not sell their property, except for a valid cause, which was to be mentioned in the deed. 6 *Partidas*, t. 16, l. 18. For example, for debts; and in that case, the landed property was to be sold at public auction, in a delay of thirty days from the first notice, and the deed of sale was to be made in

conformity to law 60, l. 18, p. 3; which was not done in this case.

4. The adjudication made to Sabin Perrin, of whom Fergus Duplantier is the vendee or *ayant-cause*, is radically null and void ; 1st. Because the property sold on a writ of seizure and sale, ought, according to the Spanish law, have been sold after three publications and three public notifications of auction, which, for immoveable property, must take place every nine days, so that there be a delay of thirty days: in this case, but eighteen days elapsed. See *Febrero, part. 2, l. 3, ch. 2, §3, p. 383, n. 136, 168.*

2d. Because the other formalities prescribed by law, have not been complied with. See *Febrero, part. 2, l. 3, ch. 2, §3, p. 404, n. 168, 169.*

3d. Because the deed of adjudication is not made in conformity to law. See *Febrero, part. 2, l. 3, ch. 2, § final, p. 540, n. 415.*

4th. Because the adjudication has not been approved in conformity to law. See *Febrero, part. 2, l. 3, ch. 2, § final, n. 416, 417.*

5th. Because, had even the preceding formalities been complied with, still the adjudication would be null, because the bond and security which were to form the completion of the sale, have never been furnished, and it has, consequently, never been perfect.

The argument drawn from prescription, cannot be legally made use of by the defendant. He never had actual possession ; legal possession, based on a title under private signature, can be opposed to third parties, but from the day of the registry in the office of a notary public. See *Civil Code, art. 2242.*

The deed under which the defendant claims, was recorded only in March, 1834.

Bullard, J., delivered the opinion of the Court.

The plaintiffs allege, that they are the instituted heirs of Nicolas Maria Vidal, and sue to recover the title papers of certain tracts of land, amounting in all to sixteen thousand arpents, which they aver, the defendant unlawfully withholds from them.

WESTERN DIST.
August, 1834.

VERBAL'S HEIRS
VS.
DUPPLANTIER

WESTERN DIST.
August, 1834.

SMITH VS. CORCORAN ET ALs.

SMITH
VS.
CORCORAN ET ALs.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

71	46
152	462
71	46
106	58
7	46
113	387
7	46
116	677

Without an assessment of a state tax, the officer has no warrant or authority to sell non-residents' land therefor, and which is indispensable to make out a valid title under a collector's sale for taxes.

The recitals in the treasurer's deed to land sold for taxes, is no evidence that it was legally assessed, as the fact of assessment was not within his cognizance.

If, in case of eviction of part of the thing, the sale is not cancelled, the value of the evicted part only is to be reimbursed, according to its estimate, proportionably to the total price of the sale.

Evidence, offered to prove the identity of a tract of land, and to correct errors in its description, is properly rejected as superfluous, when its identity is admitted in the pleadings.

Under the prayer for general relief, suited to the nature and justice of the case, the Supreme Court will render such judgment as would be given in a new suit, to avoid circuity of actions.

When there is no evidence of damages having been sustained, none can be recovered against a warrantor.

This is action of jactitation and slander of title to land, commenced by Peter Smith, residing in the state of Mississippi, against the defendant, residing in the parish of East Feliciana.

The plaintiff alleges, he is the owner, and in the actual possession of a tract of four hundred arpents of land, lying in the parish of East Feliciana; and that a certain Timothy H. Corcoran pretends to be the owner, and sets up a false and clamorous report of his title to said land, and injures and slanders the title of petitioner to his damage three thousand dollars; that said Corcoran has been amicably requested to desist from injuring and slandering the title of petitioner, but still persists in and continues it; wherefore, he prays, that Corcoran's title be decreed insufficient, and that he be perpetually enjoined from claiming title to said land, and from

slandering that of the petitioner, and condemned to pay all damages and costs.

WESTERN DIST.
August, 1834.

The defendant excepts to the action, because the plaintiff is not in possession, and that the prayer of the petition ought to require the person setting up title, to bring suit for the recovery of the land, or be for ever debarred from setting up any right or title to it.

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VS.
CORCORAN ET AL.

2. That plaintiff alleges he is in possession, as owner of the land, and does not show he has been evicted.

3. Because there is not sufficient cause alleged to maintain a possessory action, or an action of slander of title.

On the merits, the defendant pleaded a general denial; and alleges he is the owner of the tract in contest, containing six hundred and forty acres, which he purchased from one James Mooney, residing in New-Orleans, by authentic act, duly recorded, for the sum of four thousand dollars, and that he possesses by a good title and in good faith; and that, in case he is evicted, said Mooney is bound in warranty to defend his title, and calls him in warranty, and prays for the same judgment against his warrantor that may be rendered against him; for four thousand dollars, the price which he paid, and for one thousand dollars in damages and costs.

Mooney appeared by his counsel, and answered to the call in warranty. He made the same exceptions to the original action as his vendee, and pleaded a general denial to the merits; alleged title in Corcoran, and that he purchased the land by a complete title and for a *bona fide* consideration, and so possessed it, until he transferred it to his vendee in like good faith. He prays to be allowed one thousand dollars in damages and his costs.

The plaintiff exhibited a complete title to four hundred arpents, being the land in controversy, in a deed from John Foster and wife, dated 19th July, 1831. The defendant exhibited his deed from Mooney, dated 16th August, 1830, for six hundred and forty arpents, which was admitted to embrace the land in controversy, for which he gave four thousand dollars. Mooney exhibited the deed of the state treasurer to him, dated March 29th, 1828, by which he pur-

WESTERN DIST. chased this same tract of six hundred and forty arpents at a sale for the state taxes, for the sum of ten dollars. The state treasurer and public printer for 1828, proved that this land **August, 1834.**
SMITH
VS.
CONCORAN ET AL. was returned by the sheriff or collector of taxes for East Feliciana, as non-residents' lands; with the state taxes due on it; that it was regularly advertised in the public papers according to law, and adjudicated to Mooney, for the sum of ten dollars. The treasurer's deed recited these facts, but there was no proof of the *assessment* of this tract of land for the taxes; the assessment rolls were not produced in evidence.

The jury returned a general verdict for the plaintiff, and in favor of the defendant against the warrantor for four thousand dollars, together with three hundred dollars damages. The warrantor moved the court for a new trial, which was overruled. By consent entered of record, this was considered as a *petitory* action. Judgment was rendered, decreasing to the plaintiff four hundred arpents of the land claimed, and restoring him to quiet possession; and that Mooney pay to the defendant four thousand dollars, the price paid by the latter, and three hundred dollars in damages and costs. Mooney, the warrantor, appealed.

Turner, for the plaintiff.

1. There is no error in the judgment against the warrantor. The treasurer was not authorised to sell the land in contest in the month of March, 1828, or at any other time. See *Session Acts 1828*, p. 190, §2.

2. The advertisements were not legally made. *Ibid.*

3. The recitals in the deed are not proof against the plaintiff; they are not similar to a sheriff's return on a *fiery facias*. 8 *Martin*, N. S. 657.

4. There is no assessment of the taxes shown, which is indispensable to the validity of a sale for taxes. 6 *Martin*, N. S. 347.

5. The return of the taxes due by non-residents, made by the deputy sheriff of East Feliciana, is not an official act. The sheriff's return by a deputy, does not afford proof that the

plaintiff was a defaulter for taxes. *Session Acts* 1817, p. 174, WESTERN DIST.
 §10 and 11. August, 1834.

Lobdell and Hennen, for the warrantor.

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 CORCORAN ET AL

1. The verdict and judgment thereon is erroneous, as being against law authorising the sale of the land for taxes, and against the evidence, which shows it was legally sold. The verdict should have been for the defendant. *La. Code, verbo Auction Sales, Acts* 1828, p. 30. 2 *Moreau's Dig.* 445 to 493. 5 *Martin*, 698, 221. 12 *Ib.* 534. 1 *Ib.* *N. S.* 179. *Ib.* 554. 3 *Ib.* *N. S.* 705. 4 *Ib.* *N. S.* 456.

2. The judgment between Corcoran and Mooney is erroneous, because the eviction extends to but four hundred arpents, and the quantity sold to defendant was six hundred and forty arpents, of which he has possession, leaving two hundred and forty arpents undisturbed. But the judgment decrees the return of the whole purchase money, when only a portion of the land is lost. The sum recovered cannot exceed the proportion it bore to the quantity of land recovered: as six hundred and forty is to four thousand dollars, so is four hundred to the true sum to be paid.

3. The warrantor was improperly required to pay three hundred dollars in damages, when the evidence does not show any were sustained by defendant.

Bullard, J., delivered the opinion of the court.

This is a petitory action, in which the plaintiff sets up title to a tract of land, of four hundred arpents, in possession of the defendant Corcoran, who cites Mooney as his warrantor.

The plaintiff exhibits as his title, a complete grant from the Spanish government to Maria Kelsey, and a conveyance from the grantee to him.

The defendants hold, under a sale by the state treasurer for state taxes, alleged to be due by the plaintiff, a non-resident. The tract was sold as containing six hundred and forty arpents, bought in by Mooney, and by him conveyed to Corcoran, for the price of four thousand dollars.

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SMITH
VS.

CORCORAN ET AL

Without an assessment of a state tax, the officer has no warrant or authority to sell non-residents' land therefor, and which is indispensable to make out a valid title under a collector's sale for taxes.

The recitals in the treasurer's deed to land sold for taxes, are not evidence that it was legally assessed, as the fact of assessment was not within his cognizance.

As between the plaintiff and the original defendant, the only question relates to the validity of the alienation for taxes by the state treasurer.

Without considering sundry bills of exception, taken on the trial, our attention is drawn to one point, on which the case must turn. No assessment of a state tax is shown; and this court has already decided, that an assessment is indispensable to make out a valid title, under a collector's sale for taxes. Without it, the officer has no warrant or authority to sell *Nancarrow vs. Weathersbee*, 6 *Martin, N. S.* 347.

Even supposing that the recitals in the treasurer's deed, ought to be taken as true, so far as they relate to what he did, or was within his knowledge, as contended by the counsel for the defendant, the fact of the assessment was not of his cognizance, nor could he know that the list returned to him, conformed to the assessment rolls. The rolls are of public record, in the parish where the land is assessed, and may easily be produced or accounted for. The fact that this sale was made by the treasurer, and not by the parish collector, does not alter the principle. As relates to the taxes due by non-residents, both the sheriff and the treasurer are collectors; the latter only, in failure of the sheriff to collect, and when it becomes necessary to resort to coercive measures.

The judgment in favor of the plaintiff, appears to the court, supported by the law and evidence. As between the defendant Corcoran and his warrantor, it is contended that it ought to be reversed, because it is erroneous in decreeing Mooney to pay back the whole price, when his vendee is only evicted of a part of the land, and in awarding damages against him, when none were proved to have been sustained; and that the

If, in case of eviction of part of the thing, the sale is not cancelled, the value of the evicted part only is to be reimbursed, according to its estimate, proportionably to the total price of the sale.

warrantor sold and warranted a tract of six hundred and forty arpents; and his vendee in this suit, is evicted of four hundred arpents only.

"If in case of eviction of a part of the thing, the sale is not cancelled, the value of the evicted part is to be reimbursed to the buyer, according to its estimate, proportionably to the total price of the sale." *La. Code, art. 2490.*

But it is insisted, that this case ought to be remanded for trial, before another jury, because evidence was rejected by the court to the prejudice of the warrantor; and our attention is drawn to a bill of exceptions, taken by him. It appears, that his counsel offered witnesses, and other evidence, to prove that Peter Smith had but one tract of land, in the Parish of East Feliciana, in 1824; and further, to prove the true boundary of Smith's land, and to explain errors in the description of boundaries, in the deed to Corcoran. The evidence was rejected by the court. We think the court did not err. If the evidence was offered, to prove the identity of the land sold for taxes, with that claimed in this suit, it was wholly superfluous, because that identity is admitted by the pleadings. If the object was to prove any thing against, or beyond the contents of the act, it was inadmissible.

All the parties admit, that the tract of land sued for, is the same that was sold for taxes, and afterwards conveyed by Mooney to Corcoran, as a tract of six hundred and forty arpents. Although the eviction, technically speaking, may be only partial, yet here seems to be a total failure of title, on the part of the warrantor, shown by himself, for the whole amount.

This has seemed to the court, a case for the application of that provision of the code, which authorises the buyer to demand the rescission of the contract, when the part evicted is so considerable, that it is not to be presumed he would have bought, without the part evicted. *La. Code, art 2487.*

The only difficulty which has occurred to us, was a doubt whether the pleadings would justify such a judgment. On examining the record we find, that Corcoran in his answer, prays that Mooney may be cited in warranty; and in case the plaintiff should recover the land, that he may be condemned to refund the purchase money and damages; and he concludes, by praying "for all such further and other relief, as the nature of the case requires, and your honor shall be pleased to decree." This is in the nature of an original suit, and the most general prayer for relief. If we were to reduce the amount recovered against the warrantor, to twenty-five

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August, 1834.

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Evidence, offered to prove the identity of a tract of land, and to correct errors in its description, is properly rejected as superfluous, when its identity is admitted in the pleadings.

Under the prayer for general relief, suited to the nature and justice of the case, the Supreme Court will render such judgment as would be given in a new suit, to avoid circuity of actions.

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August, 1834.

VINCENT
vs.
MICHEL.

When there is
no evidence of
damages having
been sustained,
none can be re-
covered against
a warrantor.

hundred dollars, proportionably to the part evicted, we should reserve to the buyer, his right to have the sale cancelled in another suit, according to the provisions of the code. Under the prayer for general relief, suited to the nature and justice of the case, we think ourselves authorised to render such a judgment, as would be rendered in a new suit, and to avoid a circuitry of actions.

The record furnishes us with no evidence of damages having been sustained, and none can therefore be recovered against the warrantor. *La. Code, art. 2482.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and proceeding here to give such judgment, as ought in our opinion to have been rendered below, it is further ordered, adjudged and decreed, that the plaintiff recover, and be put in possession of the tract of land, described in his petition, with costs. And it is further adjudged and decreed, that the defendant Corcoran, recover of his warrantor, James Mooney, the sum of four thousand dollars, together with all the costs of this suit, in the District Court, that the sale of Mooney to Corcoran, of the land in controversy, be cancelled and annulled, and that the appellee Corcoran, pay the costs of the appeal.

VINCENT vs. MICHEL.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

A right of servitude which rests solely on the acquiescence of the plaintiff, in the burden imposed on his property, by suffering, without complaint, the drip from the defendant's house to fall on his lot or grounds for ten years and upwards, is acquired by prescription.

Where the possession or continuation of the servitude of right of *drip*, from the eaves of A's house on the lot of B, is proven to have existed more than ten years, B is barred from bringing his action of damages, or to abate it as a nuisance, against A.

WESTERN DIST.
August, 1834.

VINCENT
vs.
MICHEL.

An alteration, within the time allowed to acquire a servitude by prescription, which is made in the eave of the roof of the house of A, and which had a tendency to lighten the burden of the servitude, is *not considered* as an interruption, so as to prevent prescription from running.

This is an action commenced against the defendant, to compel him to abate a certain nuisance, and for damages sustained by the plaintiff, in consequence of its continuation.

The plaintiff states, that the lot of defendant is adjoining his, in the town of Baton Rouge, on which the former has erected his kitchen, so that the water falls from the roof into his lot, and runs on his house and kitchen, thereby causing great decay, injury and damages, by dampness and unhealthiness; and that the defendant has also erected a necessary, immediately adjoining the residence of the plaintiff, which nuisances occasion him great disquietude, and damage to the amount of three hundred and fifty dollars. He further alleges, that the defendant has been amicably requested to remove said nuisances, but has refused and failed to do so. He prays judgment for his damages, and that the defendant be condemned to remove his buildings, so as to prevent the *drip* therefrom from falling on his premises; and to abate the nuisance.

The defendant pleaded a general denial. He averred that the plaintiff, by planting pickets at each end of his kitchen, on defendant's lot, had prevented the water from running off, and which caused injury to his houses by decay, &c. That the plaintiff prevented his workmen from making repairs on his own premises, by reason of all of which injuries, he has sustained damage to the amount of five hundred dollars; for which he prays judgment in reconvention, &c.

This suit was instituted in May, 1833. The plaintiff alleges, that he had been disturbed and disquieted in the enjoyment of his residence by defendant, who, since the 2d March, 1830, had erected the nuisances complained of.

WESTERN DIST.
August, 1834.

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vs.
MICHEL.

The evidence showed, that the water had continued to run from the eaves of the defendant's house on to the lot and premises of the plaintiff for a number of years: about ten or twelve years, the witness stated. But a short time before suit, the defendant had altered the roof and eaves of his house, so as to throw the water in some manner different from what it had previously done.

The defendant, on the trial, interposed the plea of the prescription of one and ten years against the plaintiff's demand and right of action.

The cause was, on these pleadings and the evidence adduced by the parties, submitted to a jury, who returned a verdict "*for the defendant by prescription.*" After an unsuccessful attempt on the part of the plaintiff, to obtain a new trial, judgment was rendered in conformity to the verdict, from which the plaintiff appealed.

Brunot, for the plaintiff, contended, that the finding of the jury by prescription, is contradicted by the acts of the defendant, in which, it is admitted, he had no title to the servitude of drip, or, if he even had, that he had renounced it, by causing the roof of his house to be sawed off. *La. Code*, 3486.

2. The servitude of drip cannot be acquired, and title claimed to it by prescription. *La. Code*, 694, 707.

3. A servitude, if acquired, may be lost by a tacit admission of right. *La. Code*, 779.

4. This could and should set *aside* a verdict, when it is not supported by the evidence. 1 *La. Reports*, 174. 2 *Ibid.* 396. 3 *Ibid.* 353, 361.

R. & A. N. Ogden, contra.

Mathews, J., delivered the opinion of the court.

A right of servitude which rests solely on the acquiescence of the plaintiff, in the burden imposed on his property, by suf-

This is an action for damages, and to cause the defendant to abate certain nuisances, of which the plaintiff complains as interrupting him in the quiet and comfortable possession and enjoyment of his property. There was judgment for the

defendant in the court below, founded on a verdict of a jury to which the cause had been submitted, and the plaintiff appealed.

The case involves a right of servitude, as claimed by the defendant. The parties are separate owners of urban property, situated in the town of Baton Rouge, adjoining. The servitude claimed, is a right of drip from the house of the appellee on the lot of the appellant.

The verdict of the jury in favor of the former, is based on prescription. The record affords proof of the water having flowed from the roof of the defendant's house, on the land of the plaintiff, for ten or twelve years previous to the institution of the present action, in the same manner in which it did at that period.

In the present case, no written evidence of title is shown on the part of the appellee, by which he claims the servitude in question. His right of servitude rests solely on the acquiescence of the plaintiff in the burden imposed on his property, by suffering for ten years and upwards, without complaint, the drip from the defendant's house to fall on his lot.

The 761st article of the Louisiana Code provides, that "continuous and apparent servitudes may be acquired by title or by a possession of ten years, if the parties be present, and twenty years if absent." A possession or continuation of the servitude claimed in the present instance, is proven to have existed more than ten years before this suit was brought. We are, therefore, of opinion, that the verdict of the jury is supported by the evidence of the case, as no interruption to the possession of this servitude is shown on the part of the plaintiff: for, we do not consider the alteration made in the eave of the roof of the house of the appellee, which had a tendency to lighten the burden of the servitude, as an interruption.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

WHITTEN DAVE.
August, 1834.

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serving, without complaint, the drip from the defendant's house to fall on his lot or grounds for ten years and upwards, is acquired by prescription.

Where the possession or continuation of the servitude of right of drip from the eaves of A's house, on the lot of B, is proven to have existed more than ten years, B is barred from bringing his action of damages, or to abate it as a nuisance, against A.

An alteration, within the time allowed to acquire a servitude by prescription, which is made in the eave of the roof of the house of A, and which had a tendency to lighten the burden of the servitude, is not considered as an interruption so as to prevent prescription from running.

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August, 1884.

GREENFIELD
vs.
MANNING ET AL.

GREENFIELD vs. MANNING AND WIFE, ET ALs.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE
JUDGE OF THE SECOND PRESIDING.

The appellee may ask for an amendment of his judgment, on the day preceding the hearing of the case, or at any time before it is called for trial. The circumstance of the hearing and trial coming on soon afterwards, without opposition, cannot deprive the appellee of his right to the amendment, asked for in due time.

The allowance made by the jury to the defendants, for their improvements, show they were considered as possessors in good faith; and consequently the plaintiff is not entitled to the fruits and revenues of the land.

When on an attentive examination of the evidence, it does not warrant the court to interfere with the verdict, the case will not be remanded.

This is a petitory action, in which the plaintiff, who resides in the State of Mississippi, sues to recover a tract of one thousand and twenty-five arpents of land, lying in the parish of East Baton Rouge, in the possession of one Sarah Roach, since married to the defendant, James Manning. The plaintiff shows that she purchased the land in controversy, of one Jesse Roach, brother of her then husband, Benjamin Roach, by public act passed before the parish judge of East Baton Rouge, dated the 25th March, 1816, with her own money, as she alleges, for the sum of three thousand dollars; she further alleges, that the defendants have been in possession six years, and that the rents are worth three hundred dollars per annum, amounting to eighteen hundred dollars, for which she prays judgment, and for the possession of the land with all its improvements, and that she be declared to have the true title thereto:

The defendants pleaded a general denial, and that the plaintiff's title was fraudulent and simulated, that the vendor had no right to the premises, at the time of the sale; they plead title in themselves, and prescription, being in possession.

In a supplemental answer, the defendants plead lesion, that it was sold by the brother of defendant's wife, for

less than one-half its real value ; that they possess the land in good faith, and have made improvements thereon, worth five thousand dollars, which they pray to be allowed, in case of eviction ; and that the sale of plaintiff be cancelled as being made in fraud and lesion ; and that in case the sale be sustained, they pray to be decreed to be the absolute owners of one-half of the land.

WESTERN DIST.
August, 1834.

GREENFIELD
VS.
MANNING ET AL.

After the issue made up between the original parties, one Charles M'Micken, a citizen of Pennsylvania, intervened and claimed four hundred and ten arpents of the disputed premises, in virtue of a Spanish requette, dated in 1798, and an order of survey, dated New-Orleans, January 2d, 1799, signed by Manuel Gayoso de Lemos, then governor general of Louisiana, and granted to one William Coleman ; that Coleman sold to the intervenor by private act, in the state of Mississippi, dated in 1814. He prays to be permitted to intervene, and declared to be the legal owner of said four hundred and ten arpents, and be put in possession thereof.

The defendants pleaded a general denial to the petition in intervention ; set up title and possession, and rely upon the prescription of ten years, &c.

Upon these issues the parties went to trial. The jury, after hearing all the evidence, returned the following verdict : "we of the jury, find a verdict for the plaintiff, for one thousand and twenty-five arpents of land ; and two thousand dollars to the defendants, for the improvements."

After an unsuccessful attempt to obtain a new trial, the defendants appealed from the judgment, confirming the verdict.

The appeal was granted, February 2d, 1833, returnable to the Supreme Court, sitting at Baton Rouge, the first Monday in August following. The sheriff returned, that he served the citation of appeal on the appellee, the 8th January, 1833, by delivering a copy of the petition and citation of appeal, to the attorney of the appellee, she residing out of the state.

The defendants and appellants failed to bring up the appeal ; and now, at the August term, 1834, the appellee filed a transcript of the record of appeal, and insisted on a trial.

WESTERN DIST.
August, 1834.

GREENFIELD
VS.
MANNING ET AL

They had previously served a notice, in February, 1834, on the appellants, notifying them that the appeal would be brought up by them.

Lawrence and Morgan, for the plaintiff and appellee, contended, that the appellants having failed to bring up and file in this court, the record of appeal must be considered as having abandoned the appeal, and cannot complain of any part of the judgment, which may be affirmed or modified, at the instance of the appellee. *C. Pr.* 588, 590, 592.

2. The appellee prays, that the judgment decreeing the land in controversy, to belong to the plaintiff, may be affirmed with costs; that the part of the judgment, which awards the value of the improvements to the defendants, be reversed, the evidence showing the defendants were possessors in bad faith. 1 *Martin*, *N. S.* 405. 8 *Martin*, *N. S.* 608.

3. The appellee is entitled to fruits from the institution of suit, and the time of making the demand on the defendants. 8 *Martin*, *N. S.* 608.

A. N. Ogden, *contra*, suggested that as there was no appeal filed by the appellants, that it must be considered as abandoned by them. That the plaintiff and appellee, can only bring up the record, at the lapse of three days from the return day, and have the judgment affirmed, in order to take out execution. But in this case, more than a year having expired since the return day of the appeal, and the record not having been brought up by the appellants, must be considered as abandoned. There is in fact, no appeal. He also contended, there was no service of citation on the appellee, and he could not voluntarily come into court without it.

Martin, J., delivered the opinion of the court.

This is a petitory action. The defendants are appellants from the judgment, which decrees the land in contest, to belong to the plaintiff. The citation of appeal was served on the latter, who has brought up the transcript of the record, the

defendants and appellants having neglected to file it. He prays for an amendment of the judgment, in that part of it, which allows the defendants the value of their improvements, and asks this court to declare him entitled to the fruits and rents of the land, and that the case may be remanded to ascertain their value.

The defendants contended, that the *prayer* for the amendment of the judgment ought to be disregarded, as it was filed on the day preceding the hearing of the cause, and consequently, not three days before the day fixed for the trial.

The case was not fixed for trial on any particular day. On the first day of the present term, the court informed the bar that it would, on the following day, hear such cases which might be ready to be submitted, and take up, on the next day thereafter, the causes in the order in which they stood on the docket, and so continue through, until all the cases were called and disposed of; which was assented to by the bar.

As the amendment was asked for, at a time when the case was not yet set down for trial on any particular day, the appellee was in time. The circumstance of the hearing and trial of the case, coming on soon afterwards without any opposition, cannot deprive him of his right to the amendment, asked for in due time.

On the merits, the allowance made by the jury to the defendants, for their improvements, show they were considered as possessors in good faith. We have attentively examined the evidence, and it does not appear to us, that any part of it would justify our interference with the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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August, 1834.

GREENFIELD

VS.

MANNING ET AL

The appellee may ask for an amendment of his judgment, on the day preceding the hearing of the case, or at any time before it is called for trial. The circumstance of the hearing and trial coming on soon afterwards, without opposition, cannot deprive the appellee of his right to the amendment, asked for in due time.

The allowance made by the jury to the defendants, for their improvements, show they were considered as possessors in good faith; and consequently the plaintiff is not entitled to the fruits and revenues of the land.

When on an attentive examination of the evidence, it does not warrant the court to interfere with the verdict, the case will not be remanded.

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August, 1834.

MORRAN
VS.
HIS CREDITORS.

be dismissed, the petitioner not having surrendered all his estate. See 2 *Moreau's Digest*, 424, sec. 1, 3, 5.

3. There was no legal meeting of the creditors, the same not having been called according to law, no advertisement of said meeting having been posted up, as is required by law. 2 *Moreau's Digest*, 426. *Civil Code*, 438, art. 4.

4. The judge giving the order for the meeting of the creditors, did not require that the meeting should be held at the office of the parish judge, acting as notary, as the law directs. *Civil Code*, page 438, art. 4, 2d branch thereof.

Mathews, J., delivered the opinion of the court.

The proceedings in this case progressed, as far as the permission to the insolvent to surrender his property, acceptance by the judge, to whom the application was made, in pursuance of the provisions of an act of the Legislature, approved on the 29th of March, 1826, an order for a meeting of creditors, and stay of proceedings against the petitioner.

Most of the creditors were regularly cited or waived notice of citation. No meeting took place, and the record does not show that syndics were appointed. While the cause was in this situation, one of the creditors, Abner Wamack, moved the court below to dismiss the plaintiff's petition, on several grounds, stated as the basis of his motion; which was overruled by that court, on the ground that the motion was interposed too late. From this judgment he appealed.

We are of opinion that the District Court did not err, in overruling the appellant's motion. This judgment was perhaps correct, for the reason assigned; but is supportable on another ground, viz: that there were at the time, no proper parties before the court.

The act of 1826, (as we have seen above,) required the judge, to whom the petition and schedule of the insolvent were presented, to accept the property of the ceding debtor, for the benefit of his creditors. This acceptance vested in them all the debtor's rights, and ought not to be set aside, unless by proceedings of one creditor, had contradictorily with the mass of creditors represented by a syndic. It does not,

The acceptance of a surrender of property of an insolvent debtor by the judge, vests all the debtor's rights in the creditors, which cannot be divested or set aside unless by proceedings of a single creditor, had contradictorily with the mass of the creditors.

Until a syndic is appointed either by the court or the creditors, no motion or suit to dismiss the petition of the insolvent can be made or tried.

however, appear from the record, that any syndic has been appointed in the present case, either by the judge who accepted the property, or by the creditors, and until that be done, we are of opinion that a proceeding, such as is attempted by the appellant, is irregular.

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August, 1834.

GREENWELL
ET ALA.
VS.
ROBERTS ET ALA.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed, with costs.

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GREENWELL AND WIFE vs. ROBERTS ET ALA.

**APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
OF THE EIGHTH PRESIDING.**

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Error and want of consideration, in executing a note and mortgage to secure it, are sufficient causes and grounds on which to sustain an injunction against an order of seizure and sale, on such note and mortgage.

An attorney at law, who has obtained a judgment for his client, is not thereby authorised to receive a note and mortgage, in satisfaction of such judgment.

A note and mortgage, executed for the purpose of discharging a certain judgment, and made to the attorney of the plaintiff in the judgment, who shows no special authority to receive them, in discharge thereof, will be declared illegal and null.

The consideration of a note and mortgage, and the fact charged that they were executed in error, may be inquired into, in an injunction to stay an order of seizure and sale; and, if true, this summary proceeding will be declared illegal, and the injunction perpetuated.

This suit commenced by injunction. The plaintiffs allege, that in May, 1830, they gave their note, secured by mortgage on three hundred acres of land, for the sum of six hundred and fifty dollars and fifty-seven cents, payable on the 1st day of February, 1831, to A. Haralson, for the balance

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of a judgment which had been obtained against the plaintiff, Greenwell, by Rutherford, Fiske & M'Neil, of Natchez; Haraldson, the payee of the note, being the attorney of the plaintiffs in said judgment. They further allege, that an order of seizure and sale has issued on said note and mortgage, at the suit of Haraldson, to the use of Stephen Roberts, of the parish of East Baton Rouge, and that the sheriff is proceeding to sell the mortgaged land; and that the only consideration and inducement for which they executed the note and mortgage, was to satisfy and discharge the judgment of Rutherford, Fiske & M'Neil, which still stands open and in full force. They allege, that Haraldson, as the attorney of the plaintiffs in said judgment, had no right to take a note and mortgage to himself, and for his own use, in discharge of said judgment; and they allege, that Greenwell is still liable for the original judgment; and they charge, that said note and mortgage was obtained through fraud, and executed in error. They pray for an injunction against the seizure and sale, and that the note and mortgage may be cancelled; and that the defendants in injunction, be decreed to pay damages and costs.

The defendant Roberts, pleaded the general issue, denied all fraud, and alleged, that at the time of obtaining the injunction, the order of seizure and sale was suspended by the agreement of the parties, in which Greenwell executed a written obligation, to deliver his crop of cotton for the year 1832, to the plaintiffs, in the order of seizure; that the injunction was obtained under the fraudulent pretext for not complying with said obligation, and that in violation of said obligation, the said Greenwell sold and received the proceeds of his cotton and appropriated it to his own use. He prays that the injunction be dissolved, and the plaintiffs and their sureties therein, be decreed to pay the principal debt, with ten per cent. interest thereon, and twenty per cent. damages on the amount thereof, together with a further sum for special damages and costs.

It does not appear that the attorney of the plaintiffs in the original judgment, had any special authority from his clients

to take the note and mortgage in question, and that he gave no discharge to the defendant from the judgment, on receiving the note and mortgage. In the statement of facts, signed by the respective counsel in this case, it is stated, that "the defendants proved by A. Haraldson, that he, as their attorney, had instructions to make any arrangements he could with Greenwell; that he considered the claim as very doubtful, &c., but that he had no special instructions to take a note and transfer the same;" "that he had written authority by letter, and a verbal authority to make any arrangement of the debt, which was for their interest, and that he had always been willing to enter satisfaction on the judgment, &c."

The district judge gave judgment, perpetuating the injunction, reserving to the plaintiffs, in the order of seizure and sale, the right to proceed on their mortgage, whenever satisfaction shall be entered in a legal manner, of the judgment, &c." The defendants, in injunction, appealed.

Saunders, for the plaintiff in injunction.

Andrews, contra.

Mathews, J., delivered the opinion of the Court.

This is a case in which the plaintiffs obtained an injunction to stay proceedings on an order of seizure and sale of certain property, by them mortgaged to one of the defendants. On a hearing of the cause, the injunction was continued until the defendants should release the plaintiffs from a judgment which had been previously obtained against them, at the suit of Rutherford, Fiske & McNeil, of Natchez, in discharge of which, a note and the mortgage, on which the order of seizure was issued, had been given to the defendant, A. Haraldson. From the judgment perpetuating the injunction as above stated, the defendants appealed.

The grounds on which the injunction was obtained, and those on which it was continued, are want of just consideration, and error in executing the note and hypothecation.

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ET AL.
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ROBERTS ET AL.

Error and want of consideration in executing a note and mortgage to secure it, are sufficient causes and grounds on which to sustain an injunction against an order of seizure and sale on such note and mortgage.

An attorney at law, who has obtained a judgment for his client, is not thereby authorized to receive a note and mortgage in satisfaction of such judgment.

A note and mortgage executed for the purpose of discharging a certain judgment, and made to the attorney of the

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M'NICKEN
vs.

WEEMS ET AL.
plaintiff in the judgment, who shows no special authority to receive them in discharge thereof, will be declared illegal and null.

The consideration of a note and mortgage and the fact charged that they were executed in error may be inquired into, in an injunction to stay an order of seizure and sale, and if true, this summary proceeding will be declared illegal and the injunction perpetuated.

The evidence shows, that the promise to pay to Haraldson, and mortgage to secure the payment, were made under a belief that he was authorised to take them, and that they would operate a release and discharge of the judgment which Rutherford, Fiske & M'Neil had obtained against the obligors.

No authority is shown on the part of Haraldson, to transact for his clients in the manner in which he has done; no satisfaction was entered on the record in the suit of his clients against the plaintiff, Robert Greenwell; and until he be discharged from the judgment obtained in that case, neither he nor his wife can be legally considered as under any obligation to fulfil their promise to the defendant. And the summary proceeding on the act of mortgage was illegal, the contract which supports it having been made in error, and without a good or valuable consideration given at the time, on the part of the obligee.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

M'NICKEN vs. WEEMS, CURATOR, &c.

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF WEST
FELICIANA.**

The reference to the record of a suit, to show that it interrupted prescription, is insufficient to enable the Supreme Court to determine whether prescription was really interrupted.

When the evidence is insufficient to determine the fact of the interruption of prescription, but which can be ascertained, justice requires that the case be remanded for a new trial.

The plaintiff alleges, that a commercial partnership formerly existed between him and one James H. Ficklin, deceased, whose succession is now administered by the defendant, as curator; that said partnership was dissolved in September, 1817, but that no final settlement of the partnership affairs ever took place. He alleges, that the said estate is indebted to him in the sum of five thousand dollars on account of the partnership, and that it owes him four thousand eight hundred and sixty-six dollars and ninety-three cents, with ten per cent. interest from 1819 until paid, being the amount of a note signed by Ficklin, Jed Smith and Amos Webb, on the 20th September, 1817, and by mistake made payable to M'Micken and Ficklin; but which, in fact, was really due to, and intended to be made payable to the petitioner. He prays, that auditors be appointed to settle the concerns of the late firm, and that the defendant, as curator, be compelled to pay the amount of such sum as shall be found due, and the amount of said note.

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M'MICKEN
vs.
WEBB ET ALB.

The defendant pleaded a general denial; and opposed the plea of prescription of one, three and five years to the plaintiff's demand. The latter plea was not filed until after the auditors reported.

The attorney for the absent heirs, pleaded the general issue, and required strict legal proof of the plaintiff's demand, if any he has.

The auditors made a detailed report of the partnership affairs. A rule was taken on the curator and attorney of the absent heirs, to show cause why the report should not be homologated. It was opposed by both, on various grounds. On the trial of these oppositions, and after argument on the merits of the motion, the plea of prescription was filed. The plaintiff referred to a suit, petition and citation, and copy of the note, signed by Smith and wife, and judgment thereon of Charles M'Micken vs. Ira Smith and wife, to show that prescription was interrupted, but did not produce the record in the evidence on file; and also a commission and interrogatories of another suit, against Amos Webb, on the same note, to show that such a suit was brought.

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M'NICKEN
vs.
WEBB ET ALB.

The judge of probates was of opinion, that by the decisions of the Supreme Court, the plea of prescription did not apply in this case, it being in the nature of a suit by a partner against his co-partner for a settlement of accounts; he gave judgment, homologating the award of the arbitrators, allowing the plaintiff the sum of five thousand four hundred and seventy-five dollars and twenty-six cents, including Smith and Webb's note, to be paid by the curator, &c.

Downs, for the plaintiff.

1. The auditors were regularly appointed, and the defendants had due notice thereof. There was no error in the judgment homologating the award. *Code of Practice*, 441 to 455.

2. The note of Smith and Webb was ultimately taken into the account, because the arbitrators could not make a settlement without taking it, and connecting it with the accounts taken from the books.

3. At any rate, the court should not entertain the objections to the award made by the attorney for the absent heirs, as it was not necessary to make him a party, in the rule for the homologation of the award; and a non-suit was entered as to him. *Code of Practice*, 122, 177.

4. The plea of prescription, cannot prevail in a suit for the liquidation of partnership accounts. *2 La. Reports*, 450.

Bradford, for the defendant, made the following points:

1. There was error in homologating the report of the auditors, because it was made up without legal evidence before them.

2. The testimony shows, that all the evidence before the auditors was illegal.

3. The submission to the auditors was, "to examine and report upon the accounts between the plaintiff, and the estate of Ficklin," and no more; but they took upon themselves to settle the account of the partnership, which had been closed before the death of Ficklin, which was not embraced in the submission.

4. Because the said auditors proceeded *ex parte*; the attorney for the absent heirs not being notified of the time and place of meeting, by said auditors as is required by law.

5. Because there was not sufficient legal evidence offered to the auditors; or the court below, showing that the note executed by Ficklin, Smith and Webb, was the sole property of the plaintiff.

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VS.
WEBB ET ALA.

Martin, J., delivered the opinion of the court.

The curator is appellant from a judgment against him, rendered on a plea of prescription. The plaintiff urges, that the Court of Probates did not err, as the prescription was interrupted by the commencement of a suit.

The suit alluded to by the plaintiff, is indeed referred to in the record of the case under consideration; but, as the transcript of it makes no part of the record before us, we are unable to ascertain, whether the prescription was really interrupted or not; and, on the best consideration we are able to give to the case, it appears to us that justice requires, it should be remanded, in order to afford the plaintiff an opportunity of showing that prescription was interrupted.

The reference to the record of a suit, to show that it interrupted prescription is insufficient to enable the Supreme Court to determine whether prescription was really interrupted.

When the evidence is insufficient to determine the fact of the interruption of prescription; but which can be ascertained, justice requires that the case be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed; and that the cause be remanded for a new trial; the plaintiff and appellee paying costs in this court.

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August, 1834.

CAMPBELL ET ALIS

VS.

KARR.

CAMPBELL, RICHIE & CO. VS. KARR.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

A citation of appeal issuing without the seal of the court from whence it issued, is insufficient, and the appeal will be dismissed.

The signature of the clerk to the writ of citation, is incomplete without the seal of the court, which makes it evidence.

Without a sufficient citation in the first instance, the Appellate Court cannot take cognizance of a case, and must dismiss it.

The plaintiff obtained an appeal, returnable to the first Monday in August, 1834, to the Supreme Court, sitting at East Baton Rouge. The order granting the appeal is dated 2d January, 1834, and the citation issued the 15th February following. The writ of citation is signed by the deputy clerk, but the seal of the court, or any other seal, is not affixed to it.

Bradford, for the appellee, moved to dismiss the appeal, on the following grounds:

1. Because there is no certificate of the judge at the foot of the record, that it contains all the evidence produced by the parties, nor is there any statement of facts as required by law. *Code of Practice*, 586, 601, 602, 603.

2. There is no legal citation of appeal: the paper purporting to be a citation, has not the seal of the court affixed to it, as required by law.

Downs, for the plaintiff and appellant, contended, that the court in similar cases to the present, and after the return day had passed, allowed an *alias* citation to be taken out in the inferior court, returnable to the next term of the Supreme Court. *Lafon vs. Riviere*, 5 *Martin* 500. 6 *Ibid.* 1.

A citation of appeal issuing without the seal of the court from whence it issued is insufficient and the appeal will be dismissed.

2. The act of 1813, under which these decisions were made, is substantially the same as the Code of Practice. *Session Acts* 1813, p. 24, §9. *Code of Practice*, 581, 583.

Bullard, J., delivered the opinion of the court.

In this case the appellee moves to dismiss the appeal, on the ground that the citation of appeal does not bear the seal of the court from which it issued. It is true, the Code does not expressly require that the citation of appeal should be sealed; but the court has a seal, and the signature of the clerk is incomplete without it: it is that which authenticates it, and makes it evidence in other courts.

We have been urged to allow time to bring up the appeal regularly, and a new citation to be ordered by this court. This, we think, cannot be done. Without citation in the first instance, according to the order allowing the appeal, this court cannot take cognizance of it.

It is ordered, that the appeal be dismissed.

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August, 1884.

HEWET ET ALS.
vs.

WILSON ET ALS.

The signature of the clerk to the writ of citation, is incomplete without the seal of the court, which makes it evidence.

Without a sufficient citation in the first instance, the Appellate Court cannot take cognizance of a case, and must dismiss it.

HEWET & CO. vs. WILSON ET ALS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Where all the facts and circumstances of a case, are placed before a jury of the country, who make up their verdict on all the evidence adduced, with a knowledge of the parties, they are considered much more competent to decide between the parties litigant, than the court, which is bound to respect their verdict, unless clearly erroneous in law, or manifestly contrary to, or without legal evidence.

In a suit by a firm, for the restitution of stolen goods, in damages, where the wife is a party plaintiff, the acts and declarations of her husband, in relation to the matters in contest, in which he took an active part, are admissible in evidence, as forming a part of the *res gesta*. He must be regarded in this case, as representing his wife, with the consent of her partner.

WESTERN DIST. The curator *ad hoc*, appointed at the institution of suit, is not entitled to a
August, 1834. fee or an allowance, which is to be taxed in the costs of suit, and paid by
HEWET ET AL. the party cast. If he be an attorney, he may claim a fee as for profes-
vs. sional services, or be allowed a remuneration for his services, to be paid
WILSON ET AL. in either case, by, or out of the funds of, the person whom he represents.

The plaintiffs allege that their store, in the parish of East Feliciana, was broken open and robbed, in the month of June, 1832, of five hundred dollars worth of goods, by a negro man slave, named "Big Sam," belonging to the defendant Wilson, then under the control, and in the charge of one Tuberville, his overseer; and charges the latter with running said slave beyond the limits of the state, and preventing the punishment authorised by law, from being inflicted on him; that they have sustained damages by the abstraction of said goods, to the amount of two hundred and fifty dollars, and defendants have forfeited their right of abandoning said slave, to satisfy said demand, and have become personally liable for the whole amount claimed, for which plaintiffs pray judgment.

The defendants separated in their answers; Wilson by his counsel, pleaded a general denial; denied any amicable demand being made, and relied on the facts and matters set up in the answer of his co-defendant.

Tuberville pleaded a general denial, and that he was only acting as the agent and overseer of Wilson, at the time the alleged theft was committed, and is not responsible therefor; that the plaintiffs charged said slave with the theft, at the time, and one of them was permitted to punish him, until he was satisfied, although the charge proved untrue. He specially denies running said slave off, and that the amount of goods charged to be stolen, is unfounded.

The testimony is somewhat contradictory. Stolen goods, proved to belong to plaintiffs, were found on the negro, which were estimated at something near two hundred and fifty dollars.

At the instance of the plaintiffs, a curator *ad hoc* was appointed to defend Wilson, one of the defendants, who was absent from the state. After verdict and judgment for

the defendants, and an unsuccessful motion for a new trial, the curator *ad hoc* moved the court, to allow him a fee of twenty-five dollars, as a defensor of the absent defendant, The court ordered this sum to be paid, and taxed in the bill of costs, against the plaintiffs. They appealed.

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August, 1834.

HEWET ET ALA.
VS.
WILSON ET ALA.

Elam, for the appellants.

The judgment of the District Court should be reversed, as being contrary to law, and the evidence of the case.

2. The plaintiffs having established the amount of goods stolen, to be worth two hundred and fifty dollars, are entitled to judgment for that sum, and their costs.

3. The district judge erred, in decreeing the plaintiff to pay the fee of twenty-five dollars, allowed to the curator *ad hoc*, appointed to defend the absent defendant. *Pontalba vs. Pontalba*, 2 La. Reports, 466.

4. The attention of the court is particularly solicited, to the allowance made to the curator *ad hoc*, and especially the order, requiring the plaintiffs to pay it.

T. G. Morgan, contra.

Ballard, J., delivered the opinion of the court.

The plaintiffs in this case complain, that their store was broken open by a slave of the defendant, Wilson, and goods, of the value of five hundred dollars, stolen from them; and that the slave was conveyed out of the state by his co-defendant and overseer, so that they were unable to inflict on him the penalty of the law. They sue to recover the value of the stolen goods, and two hundred and fifty dollars damages.

The defendant, Wilson, being an absentee, a curator *ad hoc* was appointed to represent him. Both defendants appeared by attorneys, and severed in their answers. The defendant, Wilson, after an exception to the right of one of the plaintiffs to sue, without showing her husband's authority; which has been waived, pleaded the general issue, and united in the defence made by Tuberville, his co-defendant. The latter pleaded, that the plaintiffs, according to their own

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showing, had no right of action against him, as the overseer of his co-defendant. He further, denies the larceny, but avers that, being unwilling to screen the slave charged with the offence from punishment, he offered to surrender him to the civil authorities, or to suffer the plaintiffs to punish him; and that he was punished severely, and the plaintiffs expressed themselves satisfied. He denies having conveyed the negro out of the state, to protect him from prosecution.

Under this state of the pleadings, the case was submitted to a jury, whose verdict was in favor of the defendants, and the plaintiffs appealed.

The evidence shows, that the store has been forcibly entered, and some goods were stolen; but there was no direct and positive proof that the theft was committed by the defendants' slave. Some articles were found in his possession on search, and were restored to the plaintiffs, and the slave was whipped by the husband of one of the plaintiffs, by permission of the overseer. There is no legal evidence before the court, to show that more articles were stolen, than those which are proved to have been restored. The inventory made before the theft, and the one made afterwards, were both *ex parte*; nor do they exhibit specifically any articles. It does not appear whether the difference of two hundred and fifty dollars, between the two amounts, results from a different standard of appraisement, or from a diminished quantity of goods. It appears from the evidence, that the slave remained on the plantation, about six months after the larceny was committed.

Where all the facts and circumstances of a case are placed before a jury of the country, who make up their verdict on all the evidence adduced, with a knowledge of the parties, they are considered much more competent to decide between the parties litigant than the court, which is bound to respect their verdict, unless clearly erroneous in law, or manifestly contrary to, or without legal evidence.

All the facts were before a jury of the country, who, from their knowledge of the parties and witnesses, were much more competent to decide between the parties, than we can be; and, although public policy as well as justice requires, that owners of slaves should be held to make full restitution for offences committed by them, yet we are bound to respect a verdict, unless clearly erroneous in law, or manifestly contrary to, or without legal evidence.

In a suit by a firm for the restitution of stolen

The only question of law presented, for the consideration of the court, arises out of an informal objection to the admission

of evidence, to prove the acts and declarations of the husband of one of the plaintiffs. It is true, he is not shown to be the agent of the firm, but as the husband of one of the partners, it is shown that he took an active part in searching for the stolen property with the consent of the other partner, and inflicted corporal punishment on the slave. The declarations made by him as to the amount lost, correspond with those made by the other partner. As to the declaration that he was satisfied, it referred to the punishment inflicted on the slave. He must be regarded as representing his wife, with the consent of her partners; and his acts and declarations, as forming a part of the *res gesta*.

With this view of the law and evidence, we should affirm the judgment of the court, if it had condemned the plaintiffs to pay merely the ordinary costs of suit. But the court awarded to the curator *ad hoc* of one of the defendants, appointed at the inception of the suit, a fee of twenty-five dollars, and adjudged that it should be paid by the plaintiffs, as a part of the taxed costs. This court decided, in the case of Pontalba *vs.* Pontalba, that a curator *ad hoc* is not entitled to a fee. 2 *La. Reports*, 466. In this respect, the judgment below must be reformed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and proceeding to render such judgment on the verdict as ought, in our opinion, to have been given below, it is, further, adjudged and decreed, that the plaintiffs' suit be dismissed, and that they pay the costs of suit, except the curator's fee; and that the appellees pay the costs of the appeal.

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VS.

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goods in damages, where the wife is a party plaintiff, the acts and declarations of her husband in relation to the matters in contest, in which he took an active part, are admissible in evidence as forming a part of the *res gesta*. He must be regarded in this case as representing his wife with the consent of her partner.

The curator *ad hoc* appointed at the institution of suit, is not entitled to a fee or an allowance which is to be taxed in the costs of suit and paid by the party cast. If he be an attorney he may claim a fee as for professional services, or be allowed a remuneration for his services, to be paid in either case, by, or out of the funds of the person whom he represents.

WESTERN DIST.

August, 1834.**TUCKER vs. LILES.**TUCKER
vs.
LILES.APPEAL FROM THE COURT OF THE TRIAD JUDICIAL DISTRICT, THE JUDGE
OF THE EIGHTEH PRESIDING.

Where a contract is entered into, while the party was a *femme covert*, and some act is shown by her, to have taken place after she became a *femme sole*, by which she ratified it, it will be binding on her.

So where the defendant is sued on her note, executed while a *femme covert*, for part of the price of a tract of land, and she retains possession of the land, after her husband died, it will be considered a ratification of the contract, and binding on her.

This action is founded on the following promissory note :

" On the first day of January, 1831, we, or either of us, promise to pay to Henry Tucker or bearer, the sum of four hundred and fifty dollars, for value received, this 26th day of January, 1829. "

" Thomas C. Black, "

" Drucilla ^{her} Liles.
mark.

" Witness, "

" Robert Wilson. "

The plaintiff is the minor daughter of the payee of the note and sues the defendant Liles alone, by her curator *ad litem* John S. Gayle, and prays judgment against the defendant Liles, for the amount of the note, and interest.

The defendant admits her signature to the note, but says she was a married woman at the time, and was not aware, that she was incapable of contracting ; but she now declares, she is not liable in law to pay the note sued on, &c.

The evidence showed, that the defendant was the wife of one Valentine Liles, at the time she signed the note ; their marriage was proved by general reputation ; and that they lived together as man and wife. It was also in proof, that Liles the husband, died about the 11th February, 1830. This suit was brought, filed the 17th January, 1831.

Both parties gave in evidence, the record of a suit and judgment, on the first of these notes, (being similar to the one sued on, and given for the first instalment of a tract of land,)

on which execution issued, and the land sold to pay the judgment.

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The defendant did not plead her coverture to the first note, when sued on it, but let judgment go by default.

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The plaintiff relied on a ratification of this contract, by the defendant, after the death of her husband, in making a partial payment, on the first of the notes given for the land; the one in the present suit being for the second instalment. The receipt for the partial payment reads thus: "Received on the within note, two hundred and twenty-five dollars, January 19th, 1830." But the evidence shows that Liles the husband, died the 11th February, 1830, after the date of this payment.

The Jury returned a verdict for the plaintiff, for the whole amount of the note, with interest, upon which judgment was rendered accordingly. After an unsuccessful motion for a new trial, the defendant appealed.

An opinion was pronounced in this case, at the August term, 1832, in which the judgment of the District Court was affirmed. *See the opinion printed in 4 La. Reports, 328.*

This case was argued at the August term, 1832, at Baton Rouge, by *Mr. Saunders* for the plaintiff, and *Mr. Andrews* for the defendant.

Mr. Andrews, of counsel for the defendant and appellant, applied for a re-hearing.

1. That the court has fallen into an error, in deciding that although plaintiff was a *femme covert* when she signed the note, she ratified the contract, by making a partial payment after she became a *femme sole*. The testimony shows, and so the fact is, that the husband died, the 11th February, 1830, and the partial payment was made the 19th January, 1830, preceding his death, and while she was yet a *femme covert*.

2. The partial payment was not made on the note in the present suit.

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VS.
MAY ET AL.

rescission of the previous order of forfeiture. The case, therefore, stands as if no forfeiture had been decreed. The principal, therefore, being now in custody, the court considers that the bail ought to be discharged."

The defendants pleaded the discharge, and had judgment accordingly.

Brunot, for the state.

1. The record shows, that the bond was regularly forfeited by the non-appearance of the principal. The state, then, acquired a right to the penalty, which could not be divested except by its consent. 4 *Black. Commentaries*, 253.

2. There is but one mode pointed out by law in this state, in which the court can pronounce on a bond forfeited, and which prescribes the *duty* of the court in pronouncing judgment upon the motion of the district attorney. 1 *Moreau's Digest*, 386.

3. The record of the court *a qua* shows a forfeiture of the bond. The securities, then, could only on the motion of the district attorney discharge themselves, by proving that before the forfeiture their principal had died, or other sufficient cause.

Ripley and Lawson, for the defendants.

1. The proceedings on the forfeiture of a recognizance must be had according to the ordinary forms of practice.

2. When the appellees were regularly called, and failed to produce the prisoner, the state should have taken a default against them, which, after the legal delay and proper showing, would have matured into a final judgment. 1 *Moreau's Digest*, 369, 386.

3. The judgment of forfeiture should have been signed by the judge, to make it valid.

Martin, J., delivered the opinion of the court.

The state is appellant from a judgment which rejects its claim to the penalty of a recognizance, for the appearance of a person charged with an indictable offence.

The record shows, the accused and her bail were called, and did not appear; that the court extended the time for bringing the body of the defendant, till the first day of the ensuing term; that during that time, the principal was surrendered, tried and acquitted.

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Errors in the rendition of the judgment are assigned, as follows :

1. The surrender was made after the expiration of the time allowed at common law, to the bail, to claim an *exoneratur*.

2. During the pending of the proceedings, by notice on the part of the state, for the recovery of the penalty, and after the *contestatio litis* was formed, the court was without authority to entertain a motion to discharge the bail.

3. The bail was discharged on motion, and without issue joined, while the state, having acquired a right to the penalty, was entitled to all the advantages of a party litigant in a court of justice.

Forfeited penalties are recovered on motion without the formality of any pleading.

4. After a forfeiture has been duly entered, it cannot be set aside in any other manner, than according to the act of 1818.

Where a surrender is made of the accused into the custody of the law, even after forfeiture has been entered, and the state avails itself of it by trying the criminal, the bail are entitled to be discharged.

5. Admitting that the court had the right of extending the time for the surrender of the principal, the bail could not avail themselves of the extension after the period was expired.

When the principal is tried and acquitted before judgment for the recovery of the forfeited penalty, on failure to appear at the first term, the bail will be discharged.

It has appeared to us, the District Court did not err. Forfeited penalties are recovered on motion, without the formality of any pleading. The surrender of the accused having been made, the state having availed itself of it by trying the defendant, who was acquitted, and this being shown before judgment was awarded for the state, the bail were entitled to their discharge.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed.

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vs.
CROFT.

INGRAM vs. CROFT.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT.

The party who demands a new trial, on the ground of newly discovered evidence, since the trial, must show, not only due diligence before, but that the evidence is competent and material.

So an affidavit, setting forth, that certain depositions taken in another suit, to which the plaintiff was a party, but not between the same parties, is insufficient to obtain a new trial, on the ground of newly discovered evidence.

Where a witness swears from *his impressions*, that a fact was so and so, it is insufficient, and the testimony should be rejected.

The plea of the general issue, and the plea of prescription, are not inconsistent with each other.

The possession of a joint note, by one of the drawers, with a receipt of payment by the holder or possessor endorsed on it, by the person entitled to receive it, is *prima facie* evidence of the liability of the other drawer, to refund one-half of the note.

The plaintiff alleges, the defendant is indebted to him, in the sum of two thousand four hundred and fifty dollars, with interest thereon, at the rate of nine per cent. per annum, from the 20th day of April, 1826, until paid. He charges, that the defendant became so indebted, in pursuance of an agreement between them, to take up a note of one James A. Kirkland, which had been discounted in the branch bank of Louisiana, at St. Francisville, upon which four thousand, nine hundred dollars was due, in which each of them were to pay one-half thereof. He alleges, that on the 20th April, 1826, he paid and took up said note, and that the defendant, in pursuance of said agreement between them, and with the drawer, (Kirkland,) became responsible to him for the one-half, amounting to two thousand, four hundred and fifty dollars.

The defendant pleaded a general denial to the plaintiff's demand, and prescription.

The plaintiff offered in evidence, the note of Kirkland, mentioned in the petition, which had on it the cashier's receipt and certificate endorsed, that it was only for four thousand nine hundred dollars, and that the plaintiff paid it with his check, dated April 20th, 1826. He then offered several notes and drafts in evidence, signed by himself and the defendant, and endorsed by the latter, which had been discounted at different times, to raise the money to take up Kirkland's note, and which notes he had paid off, as appeared by receipts endorsed thereon, to him.

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The testimony failed to connect the notes offered in evidence, with the agreement, alleged by the plaintiff to have been entered into by the defendant, to pay half the note of four thousand nine hundred dollars of Kirkland, which was proved to have been taken up in bank, by the check of Ingram.

Several of the notes offered in evidence, were objected to, and bills of exception taken to their admission, on the ground of irrelevancy, and that they were *res enter alios acta*.

The jury returned a verdict "*for the defendant*;" upon which judgment was rendered accordingly, after an unsuccessful effort to obtain a new trial, mainly on the ground of newly discovered evidence, since the trial. The plaintiff appealed.

Lawson, for the plaintiff.

Andrews, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff and appellant relies, for a reversal of the judgment of the District Court, on various grounds, which we proceed to notice in the order in which they are presented.

I. That the court refused to grant a new trial, which was asked on the ground of newly discovered evidence.

In his motion for a new trial, the plaintiff set forth, as one of the grounds, that he had discovered, since the trial, that the answers of Cash, Collins and Browden, and John

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Stirling, whose depositions were taken by the defendant in the case of himself vs. Kirkland and Lee Hardesty, syndic, will prove and establish the joint undertaking, and equal liability of plaintiff and defendant for Kirkland to the bank. The affidavit in support of his motion, in reference to the above ground, sets forth, that the affiant has good reason to believe that the facts are true and correct, and that those facts were unknown to him, although he had used every effort and diligence in his power, to procure the necessary testimony; and, in support of his affidavit, he annexes, as a part of it, the affidavit of William Stewart, one of the witnesses, taken in the case above referred to; and in reference to the second ground, he refers to the record in the same case.

The party who demands a new trial on the ground of newly discovered evidence since the trial, must show, not only due diligence before, but that the evidence is competent and material.

So an affidavit, setting forth that certain depositions, taken in another suit, to which the plaintiff was a party, but not between the same parties, is insufficient to obtain a new trial, on the ground of newly discovered evidence.

The party who demands a new trial, on account of new evidence discovered since the trial, must show, not only due diligence before, but that the evidence is competent and material. Admitting that the affidavit in this case, is sufficient as to diligence, it sets forth, the new evidence to be offered on a second trial, to be certain depositions of witnesses taken in a case in which the present defendant was plaintiff, but not between the same parties. It is clear, that those depositions could not be read in evidence on the new trial, because they are, as to this defendant, *ex parte*. It would be quite nugatory to grant a new trial, in order to let in new evidence, which, according to the affidavit itself, would be inadmissible. We cannot look at the depositions to ascertain what effect the statements of the witnesses would probably have, but the party must be confined to his affidavit. But it is said, that if the depositions are not legal evidence, the witnesses may be sworn on the new trial. The affiant does not allege that the witnesses are material, and that he had used due diligence; nor are we informed whether their attendance could be procured. The party is presumed to have set forth his whole ground, and to have sworn to as much as his conscience would permit. Having confined himself to the affidavits or depositions of the witnesses, on file in another case, we can look only at those depositions to ascertain, whether they are material and competent. The

record is annexed to the affidavit, but merely to exhibit in *extenso* the depositions in question, and the affiant does not allege that the record itself is the evidence which he has discovered, but the depositions of the witnesses contained in it.

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II. The appellant further relies on a bill of exception, taken to the ruling of the district judge, in rejecting certain statements of a witness as to his impressions. The witness had been called on by plaintiff to write a note, which was afterwards signed by both parties. He says: "The impression was made on his mind, that the money was borrowed to take up a note in bank, given by Ingram and Croft, in relation to J. A. Kirkland; but whether he received this impression from plaintiff when he asked him to draw the note, or from conversations between plaintiff and defendant, in his presence, he cannot say." We think, the court did not err in rejecting these statements. Facts alone are to go to the jury, except in certain cases, the opinions of persons skilled in certain trades or professions. The impressions of a witness are nothing more, than the hasty conclusions drawn by his own mind, from certain facts, falling under his observation. The jury must have evidence of the facts, in order to ascertain what impression they will make on their minds. Parties are not to be tried by the witnesses, but by the jury.

Where a witness swears from his impressions, that a fact was so and so, it is insufficient, and the testimony should be rejected.

III. It is further contended, that the judge ought to have charged the jury, that the plea of prescription, is a waiving the general issue, and admitted the facts as alleged. We are of opinion, that the two pleas are not inconsistent with each other. The general denial, puts at issue the right of the party to recover; and the plea of prescription is founded, not exclusively on a presumed release and payment, but in some measure, from public policy, upon the negligence of the party to prosecute his right: *Interest reipublicæ ut finis sit litium*. The plea, therefore, of the general denial, and the plea of prescription may, in our opinion, well stand together.

The plea of the general issue and the plea of prescription, are not inconsistent with each other.

On the merits, it appears, that the plaintiff's right of action is founded on the alleged promise of the defendant, to be jointly bound with him to discharge a debt due by Kirkland,

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The possession of a joint note by one of the drawers, with a receipt of payment by the holder or possessor endorsed on it, by the person entitled to receive it, is *prima facie* evidence of the liability of the other drawer, to refund one-half of the note.

to the Bank of Louisiana, which, he avers, was paid entirely by himself, and he demands of the defendant one-half, according to the agreement.

Among other circumstances going to support his pretensions, he alleges, that the parties gave their joint note in favor of Kirkland, for two thousand dollars, dated April 28th, 1826, at nine months after date, and payable at the counting-house of Dicks, Booker & Co., which he annexes to his petition. This note appears to have been endorsed by the payee, and is receipted on the back by Dicks, Booker & Co., as having been paid by Charles Ingram. As a proof of the transaction itself, we think the possession of the note by Ingram, with the receipt of the holder or endorsee, sufficient to show *prima facie* the liability of Croft to refund one-half of the amount of that note. If the plaintiff had made that note the basis of his action, we do not find any evidence in the record to repel the demand for one thousand dollars. The signature of Dicks, Booker & Co. was proved on the trial. If they had been sworn as witnesses, they could not have been permitted to contradict their own act. But the plaintiff does not sue on that note as a single transaction, but sets it forth merely as evidence, to show a contract to refund a larger sum, a part of which was paid by means of this note. It was, therefore, before the jury as a circumstance, from which they were asked by the plaintiff to infer, that the defendant had promised to refund to him, not one-half of that note, but one-half of the five thousand dollars, paid by him in bank. We find no evidence in the record, which connects the two transactions. The tenor of that note, together with the joint affidavit of the parties before the notary, at the meeting of the creditors of Kirkland, certainly furnish some presumption that there was an understanding and agreement between the parties, as alleged in the petition. But it was a question of fact, submitted to the jury, and parties are bound to do something more than render their case probable. In reviewing the verdicts of juries, we have uniformly acted on the principle, not to disturb a verdict, unless clearly contrary to law and evidence. In this case, the engagement of the defendant to

refund one-half of the debt paid in bank, is not so clearly made out as to authorise us to set aside the verdict. But, at the same time, justice, in our opinion, requires that the judgment should be so expressed, as not to bar the plaintiff's right in a separate suit, to demand one-half of the amount paid by him to Dicks, Booker & Co., in discharge of the joint note of the parties.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs; reserving, however, to the plaintiff his right, if any he have, to claim of the defendant the reimbursement of one-half of their joint note of the 8th of April, 1826.

LILES VS. RHODES.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING

Where the conduct of a bidder and purchaser at sheriff's sale, is of such a character as to prevent competition in bidding, and deprive the owner of a higher price for his property than would otherwise have been obtained, the owner may have the sale annulled, and such damages awarded as a jury may assess to be reasonably sustained.

Where the sale made by a sheriff is rescinded on account of the improper and illegal conduct of the buyer at the time of sale, the owner must refund the price which was paid.

But where the owner of land, sold at sheriff's sale, obtains a rescission of the sale with damages against the purchaser, the latter may go in compensation of the price which is to be refunded to the purchaser.

The plaintiff alleges, she purchased a tract of land with one T. C. Black, for one thousand eight hundred dollars,

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payable in four annual instalments of four hundred and fifty dollars each, for which they gave their joint and several notes. When the first note became due, in 1830, she paid her half thereof, (two hundred and twenty-five dollars,) but Black failing to pay his, judgment was obtained, and execution levied on the land. The plaintiff alleges, the defendant (who is her son-in-law,) promised and pretended to act as her agent, when the land seized, was to be sold, and to buy it in; that he appeared at the sale, and so gave it out to the by-standers, but that when the sale came on, he acted in fraud, and falsely pretended to bid it in, prevented others from bidding the value of the land, and bid it in for himself, at a very reduced price. That in order to carry on his fraud and misrepresentation, he bid off the land in her name, for twenty-eight dollars less than a fourth of its value, and the sheriff made his return on the execution, that he had sold the land to the plaintiff, and a twelve months bond prepared, for her to sign as principal, and by defendant as her surety; that defendant, the better to carry on his deception, told the sheriff that plaintiff refused to sign the bond, and procured another to be made out, and signed by himself, as purchaser; that defendant turned her out of possession, forcibly, in virtue of this pretended sale and purchase by him, and retains and claims the land as his own. She alleges, that this pretended sale is a nullity, for the causes stated, and others that will appear; and that there was no legal advertisement of sale, and no written notice of seizure, as the law requires; no adjudication of the property was made to defendant, it being actually made to the plaintiff, but owing to defendant's fraud and misrepresentation, he obtained the sale to himself, at less than one-fourth part of its value; she further alleges, that defendant, by a similar fraud, has obtained the possession of nine slaves, one of whom died in his possession, and has retained possession thereof, from 3d May, 1831, until December, 1832. That their services are worth one thousand dollars; and that she has sustained two thousand four hundred dollars in damages, &c. She prays judgment for the delivery to her of the land, and that the sale thereof, be

cancelled and annulled, and that she have judgment for one thousand dollars, the price of the hire of her slaves, and damages.

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The defendant pleaded a general denial.

The evidence of the plaintiff showed the facts, which she alleged to be in substance as set forth by her. The jury returned a verdict in her favor, annulling the sale, and restoring to her the land in question, and two hundred dollars in damages; from judgment rendered thereon, the defendant appealed.

Andrews, for the plaintiff.

1. It is objected, that the plaintiff shows no title. She sets up an absolute title to the land, and the defendant claims it under her title, bought at sheriff's sale, and cannot attack it. 2 *La. Reports*, 209.

2. The judgment of the court is *not* for more than is claimed; it annuls the sale, restores the land, and decrees damages for its illegal detention, &c., which is all we ask. The laws give us possession, when the land is decreed to belong to the plaintiff, even if the verdict had been silent in that matter. *C. Pr.* 628, 630, 631, 632, 633.

3. The amount of damages recovered, are proved, and are partly in lieu of rents.

Saunders, *contra*.

1. The plaintiff has shown no title to the land, the sale of which is sought to be rescinded.

2. The judgment of the court is for more than is demanded in the petition, as given by the verdict of the jury. He prays for a rescission of the sale and damages; the judgment rescinds the sale, gives damages, and *decrees the land* to be the property of the plaintiff, and orders a writ of possession.

3. The amount of damages is contrary to law, and the evidence of the case.

4. The judgment and verdict are, therefore, contrary to law, and ought to be reversed.

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RHODES.

Mathews, J., delivered the opinion of the court.

This suit is brought to annul a sale of a certain tract of land, which was sold by the sheriff of East Feliciana, to satisfy a judgment, which had been obtained against the plaintiff, at the suit of Sarah Tucker, and also to recover damages, and the price of certain slaves, alleged to be the property of the plaintiff.

The cause was tried by a jury in the court below, who found a verdict for the plaintiff, and assessed her damages at two hundred dollars. On this verdict, the court decreed the sheriff's deed to be cancelled and annulled, ordered the plaintiff to be put in possession of the land in dispute, and the recovery of the damages assessed, &c. From this judgment the defendant appealed.

The evidence of the case shows, that the land now in contest, was seized under an execution, which issued on the judgment obtained by Tucker vs. Liles, (as above stated,) that on the first exposure to sale, it did not produce in cash, the sum required by law, and that it was afterwards offered for sale at a credit of twelve months, when Rhodes the defendant bid for it. Previous to bidding, he declared to several persons, that he intended to bid for the defendant in execution. This information he communicated to a certain person, who appeared as a witness in the present suit, and testifies that his intention was to bid, and would have given more for the property, than the sum for which it was struck off to Rhodes, except for his belief, that the latter was really bidding for Liles, on whom he did not wish to enhance its value, as she was the defendant in execution, and owner. The sheriff was also told by the defendant, that he bid as agent for the present plaintiff: and it appears by his return on the execution, that it was adjudicated to her. She however refused to give the bond required by law, in cases of sheriffs' sales on a credit; and the officer conveyed the land to the defendant, who executed his bond to secure the price of adjudication, obtained possession of the property adjudicated, and finally paid the price.

There are certainly irregularities in the proceedings of the sheriff, as above stated. Whether these irregularities would, without the additional circumstances disclosed, afford good grounds to annul the sale, is a question which we deem it unnecessary to settle on the present occasion. The conduct of the defendant, whether the motives which led him to act as he did, were honest or fraudulent, certainly caused great prejudice to the plaintiff, by preventing other bidders from giving a greater price for her property, then about to be disposed of, according to the rigor and formalities of law.

We conclude, that there is no error in the verdict and judgment of the court below. It would, however, produce injustice to the defendant, to allow the plaintiff to obtain possession of the land, without refunding to him the price actually by him paid for it, and which was appropriated to the extinguishment of the plaintiff's debt. The sum paid, appears to be two hundred and ninety-seven dollars, ninety-four cents. The payment was made on the 14th of November, 1831. Now, as the sale is rescinded, the defendant must recover this amount with legal interest. The judgment which annuls the sheriff's sale, and orders restoration of the property, seems to have been pronounced about the 20th of April, 1833. The interest which had accrued at this time, is nineteen dollars, eighty-five cents, making an aggregate of three hundred and seventeen dollars, seventy-nine cents. The two hundred dollars damages, assessed to the plaintiff in the present suit, ought to be allowed in compensation of the amount due to the defendant, which leaves a balance of one hundred and seventeen dollars, seventy-nine cents.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed; and it is further ordered, adjudged and decreed, that no execution or writ of possession shall issue in this case, until the plaintiff and appellee, shall have paid to the defendant and appellant, the sum of one hundred and seventeen dollars, seventy-nine cents, or shall deposit this amount with the clerk of the

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BROOKS

Where the conduct of a bidder and purchaser at sheriff's sale, is of such a character as to prevent competition in bidding, and deprive the owner of a higher price for his property than would otherwise have been obtained, the owner may have the sale annulled and such damages awarded as a jury may assess to be reasonably sustained.

Where the sale made by a sheriff is rescinded, on account of the improper and illegal conduct of the buyer at the time of sale, the owner must refund the price which was paid.

But where the owner of land, sold at sheriff's sale, obtains a rescission of the sale with damages against the purchaser, the latter may go in compensation of the price which is to be refunded to the purchaser.

CASES IN THE SUPREME COURT

WESTERN DIST. District Court, for the parish of East Feliciana, and for
August, 1834. the use of the defendant. It is further ordered, that the
 appellant pay the costs of this appeal.

WILLIAMS
vs.
BETHANY.

WILLIAMS vs. BETHANY.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT.

A peremptory exception may be pleaded, after the cause has been remanded for a new trial.

According to the 420th Article of the Code of Practice, an amendment of the answer after *issue joined*, may be made by adding new exceptions, provided they be not of the dilatory kind.

So in an action for the recovery of rent, on the lessee's holding over, after the case has been remanded, he may oppose the exception, that after the expiration of the lease, he tendered the possession of the premises.

A new trial will not be granted on the allegation that the verdict is contrary to law and evidence, when on an examination of the evidence, it does *not* appear the jury were clearly wrong.

This is an action founded on a written obligation of the defendant, to pay the plaintiff three hundred dollars, for the rent of two plantations, for one year, ending in January, 1829, in which the obligor bound himself "to take the most particular care of all the improvements, and return the rented premises under a good and lawful fence."

The plaintiff charges the defendant with holding over, and not paying the rent for the year, ending in January, 1829, and doing great damage to the premises, for which he claims three hundred dollars, the price of his rent, and ten thousand dollars in damages, for the injuries, dilapidations, &c., caused by his misconduct to the lands and improvements.

The defendant admitted his signature to the instrument sued on, but pleaded a general denial, and negatived every other allegation in the petition.

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He next interposed the plea of *res judicata* to all that part of the plaintiff's demand, which charges him with damages for the ruinous and dilapidated state of the premises, &c. ; that all these matters have been adjudged, in a former suit between the parties.

In an amended answer, the defendant averred, he had delivered up the premises, at the end of the year, which were received by the plaintiff. This amendment was objected to by the plaintiff's counsel, but overruled and admitted.

Upon these pleadings, the parties went to trial.

The plaintiff's attorney offered in evidence, the testimony of Vincent Vaughan, residing in the state of Alabama, and Mrs. R. Cooney, of the parish of East Feliciana, which testimony had been taken down by the clerk, on the trial of another suit between the same parties, for the first year's rent, and damages done to the leased premises, which suit and judgment therein, was unappealed from ; the defendant's counsel objected to the reading of this testimony, because it was not the best of which the nature of the case admitted ; that the testimony of these witnesses, taken in the present suit, would be better than that in the former, &c. The court overruled the objections, admitted the testimony, and a bill of exceptions was taken to the decision.

The defendant then offered in evidence, the record of the suit and judgment, for the first year's rent, and one hundred and fifty dollars in damages, for injuries and damages, which was pleaded as *res judicata*.

The cause was submitted to a jury, on the evidence adduced by the parties, who found a verdict for the defendant ; from the judgment rendered thereon, after an unsuccessful attempt for a new trial, the plaintiff appealed.

[This case was formerly before this court, at the May term, 1830, in the Eastern District. See 1 *La. Reports*, 315.]

Turner, for the plaintiff.

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1. The objection made, to the defendant's amended answer, averring delivery of the premises, at the end of the first year, ought to have been sustained, as the amendment changed the issue, &c.

2. The motion for a new trial, was improperly overruled.

3. The plaintiff is entitled to a judgment, upon the evidence adduced in the cause, for the rent of the premises, held over by defendant, and to damages; the testimony fully and clearly establishes the allegations in the petition.

Andrews, contra.

Bullard, J., delivered the opinion of the court.

This case was before the court, on appeal, at a former term. 1. *La. Reports*, 315. The judgment in favor of the defendant was then reversed, and the cause, remanded for a new trial. One of the points then made by the plaintiff's counsel was, that evidence to prove an offer, to surrender the rented land to the proprietor, was inadmissible, unless such offer was pleaded. In this position he was sustained by this court.

A peremptory exception may be pleaded after the cause has been remanded for a new trial.

According to article 420 of the Code of Practice an amendment of the answer after issue joined may be made by adding new exceptions, provided they be not of the dilatory kind.

So in an action for the recovery of rent on the lessee's holding over, after the case has been remanded, he may oppose the exception that after the expiration of the lease, he tendered the possession of the premises.

On the day fixed for the new trial, in the District Court, the defendant obtained leave to amend his answer, and, in his amended answer, sets up the exception, that after the expiration of the lease, he tendered possession of the premises to the plaintiff, and that he received the place, and retained possession by himself or his tenants. The filing of this exception was opposed by the plaintiff's counsel, on the grounds, 1st, that it came too late, and 2dly, that it changed the issue between the parties. A bill of exceptions was taken, and is now relied on as one of the grounds for reversing the judgment, rendered on the second trial. The exception was in our opinion peremptory, and might well be pleaded at that stage of the proceedings. The 420th article of the Code of Practice, authorises an amendment of the answer after issue joined, by adding new exceptions, provided they be not of the dilatory kind. This is certainly not a dilatory exception. It goes to extinguish the action of the

plaintiff. If the other party was taken by surprise, it would have justified a further delay, in procuring evidence to rebut, but he chose not to ask that indulgence, but went into trial.

The appellant contends, that a new trial should have been granted, on the grounds stated by him in his motion, for that purpose; that the verdict was clearly contrary to law and evidence. On an examination of the evidence, which comes up in the record, we are not enabled to say, that the jury was so clearly wrong, as to authorise us to disturb the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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A new trial will not be granted on the allegation that the verdict is contrary to law and evidence, when on an examination of the evidence, it does not appear the jury were clearly wrong.

BELL vs. NORWOOD, ADMINISTRATOR, &c.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF EAST
LOUISIANA.

In an action on an account current, founded on a long course of commercial transactions between the parties, in which payments are charged for sums paid to take up drafts accepted by the plaintiff, the possession of the draft by the acceptor, is *prima facie* evidence of the payments charged in the account, and may be given in evidence in support of such items in the general account.

The rule, that an acceptor of a bill is bound to show, not only the drawing and acceptance of the bill and its payment, but that it was put in circulation after acceptance, and that the drawer had no funds in his hands, applies only to cases where the acceptor declares upon a bill of exchange against the drawer.

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offered in evidence are payable to *Gray*, if the amounts and dates of the drafts correspond with those charged in the account, they will be received in evidence.

A letter of guarantee must be construed strictly to charge the guarantor : so where A recommended B to the credit of C, and the latter made the advance to B and D, as a firm, on the faith of the guarantee : *Held* that the guarantor is not bound thereby.

The testimony of one witness to a signature, who swears he saw the party sign, and whose credibility is not impeached, will not be *invalidated* by the negative statements on oath of two witnesses, made on a comparison of handwriting of the party, and his signature to documents on file in the suit.

Where the amount of a debt, or an agreement to pay money, exceeds the sum of five hundred dollars, the testimony of one witness alone is insufficient to prove such debt or demand.

Accounts and letters relative to sales made by the plaintiff, and rendered to the defendant anterior to the date of the first item of the account sued no, are admissible in evidence, because it may also be shown that a subsequent settlement took place, and the moneys arising from such sales were accounted for.

The re-possession of a note once specially endorsed by the payee, is not evidence of title to it, but that it is, if the transfer is made in blank.

Parole evidence, to prove an agreement to pay interest at ten per cent., is clearly illegal and inadmissible.

This is an action to recover the balance of a mercantile account by the plaintiff, who was a commission merchant in New-Orleans, against the defendant, as administrator of the succession of Abel T. Norwood, deceased, in which the former claims a balance of five thousand four hundred and seventy-one dollars and thirty-one cents, for moneys advanced, services rendered as commission merchant, for cash paid on acceptances, commissions, guarantees, cash laid out and expended for the use of the deceased, for goods, wares and merchandise furnished him at sundry times, between the

2d day of June, 1831, and 24th day of June, 1832, according to the general account current annexed.

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The plaintiff specially charges as items in said account : That the said Norwood, deceased, executed his note on the 21st December, 1831, payable twelve months after date, at the counting-house of plaintiff, in New-Orleans, for three thousand dollars, which was duly protested for non-payment; and on the 15th May, 1832, the deceased executed another note, payable four months after date, for one thousand four hundred dollars, at New-Orleans, also protested, &c. ; that at the special instance and request of the deceased, and under his guarantee, he accepted and paid two drafts of Messrs. Hardesty & Neill, one for two hundred and twenty-three dollars and eighty-six cents, the other for eight hundred and forty-three dollars and fifty-three cents, which, with interest and commissions amounts to the sum of one thousand and ninety-six dollars and seventy-nine cents, and which the estate of the deceased is liable for. He prays judgment for the said sum as exhibited to be due by the account rendered, of five thousand four hundred and seventy-one dollars and thirty-one cents, with interest and costs.

The administrator pleaded a general denial, and put the plaintiff on the proof of every item and allegation in the petition and account.

Harvey, witness for plaintiff, states that he examined the account sued on, item by item, and finds it correct; that the balance charged to be due, is really due; that the note of one thousand four hundred dollars in said account was signed by the deceased in witness's presence; that the plaintiff endorsed the other notes, and paid them; and he believes they were given to enable Norwood to raise money on them. The notes and drafts mentioned in the account, were then produced, and their signatures proved. The two drafts of Hardesty & Neill were contested, on the ground that the deceased had never been notified that the plaintiff had accepted his recommendation to advance them credit or

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August, 1834. letter of credit is as follows:

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"Mr. Saml. C. Bell."

"Sir: Any thing you can do for the bearer, Maj. S. W. Neill, whom I hereby introduce as my friend, will be done for me, he being a merchant in Clinton."

"I am, &c."

"A. T. Norwood."

"P. S. If you should accept for Mr. Neill for \$1000, I will be bound by this note."

"I am, &c."

"A. T. Norwood."

The parties introduced documentary evidence on both sides, to show the state of the respective accounts of the plaintiff and the deceased, and after an examination of all the evidence submitted, the probate judge found a balance of four hundred and three dollars and seventy-one cents due to the estate of the deceased, for which judgment was given. The plaintiff appealed.

It appeared from the account current sued on, that the first item was stated as follows: "1831, June 3. To balance as per account due this day, \$743 81." This item was supported by the testimony of a single witness. The defendant opposed its being allowed, on the ground that the testimony of one witness was insufficient to establish a demand or debt over five hundred dollars. The probate judge admitted it.

Downs, for the plaintiff and appellant.

1. This is a suit brought by a commission merchant against the defendant, as administrator of A. T. Norwood, deceased, for the balance due by account, arising from drafts and notes paid, and advances, all on account of the deceased.

2. The judgment of the Probate Court ought to be reversed, because the question, whether the plaintiff had funds to meet those drafts and notes, was not made by the pleadings, and if it was, the *onus* was on the defendant to show it. The plaintiff could not be required to prove a negative. 8 *Martin*, N. S. 257.

3. But if the *onus* is devolved on the plaintiff, the testimony abundantly shows the fact.

4. It appears from the face and words of the drafts, that no funds of the deceased were in the hands of the plaintiff with which to take them up, consequently the estate must be charged with them.

5. The rule of law on which the judge of probates decided the case, does not apply. It is not a suit on the drafts, but on account current, in which the amounts of the drafts are included, and they produced as vouchers to show how the plaintiff applied the funds in his hands.

6. The suit is, in fact, founded on the amount of two notes, one for one thousand four hundred dollars, the other for three thousand dollars; the guarantee to Hardesty & Neill of one thousand and ninety-six dollars and seventy-nine cents, and the balance for goods sold and delivered, and not on the drafts.

7. The sums we claim, have in fact been admitted. Admissions and accounts rendered, must be taken entire. 1 *Phil. Ev.* 84. 3 *Martin, N. S.* 452. 6 *Ibid. N. S.* 582. 1 *La. Reports*, 281.

8. An account rendered and not objected to, is binding on the party to whom it is rendered. 7 *Martin, N. S.* 140. 3 *La. Reports*, 544.

9. The two and one-half per cent. commissions, ought to have been allowed. The evidence in the case, completely brings it within the exceptions, to be found in the case of *Millaudon vs. Arnaud*, 4 *La. Reports*, 542.

10. The objection, that the testimony of one witness is insufficient to prove this account, as it is over five hundred dollars, does not apply. It could only apply, under any circumstances, to the first item of seven hundred and forty-three dollars, which is inserted in the account sued on, as the balance of a former account then unpaid. This item is abundantly proved by corroborating testimony, in support of the single witness.

11. The estate of Norwood, deceased, is bound by the guarantee of Norwood, made in his life-time in behalf of

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Hardesty & Neill, in his letter of credit to the latter; and the circumstance of the drafts being in the name of Hardesty & Neill, can make no difference in the binding effect of the letter. The very words of the letter are: "If you accept for Neill, I will be bound."

Andrews, for the defendant.

1. The testimony of a witness, that a balance of seven hundred and forty-three dollars existed at a certain time, is not competent evidence. The items on which such balance is struck, should be proved; and the testimony of one witness is not sufficient proof. *La. Code, art. 2257. 5 La. Reports, 266.*

2. Drafts drawn by *J. S. R. Guay*, should not be received in evidence under an allegation in the petition, *that drafts were drawn by J. H. Gray. 3 Martin, N. S. 636. 2 Ibid. N. S. 666.*

3. Where the acceptor of a bill sues the drawer, he must prove, 1st. The drawing of the bill; 2d. He must rebut the presumption of having funds in his hands belonging to the drawer, out of which to pay the bill, by showing the absence of them; and, 3dly. He must prove payment of the bill by himself, to some person authorised to receive it. The mere possession of the bill, is not even *prima facie* evidence of payment. *Starkie on Ev. part 4, 276. Chitty on Bills, edit. 1830, 410. 6 La. Reports, 336.*

4. Where a bill or note is transferred by a special endorsement, the endorser must show a re-transfer to him, before he can maintain a suit in his own name. *7 Martin, N. S. 253. 1 Ibid. N. S. 101 and 373. 7 Cranch, 163.*

5. An agreement to be bound for a draft, drawn by S. W. Neill, is not an undertaking for the firm of Hardesty & Neill. *4 Cranch, 224. 1 Mason, 368. Coxe's Digest, 357.*

6. Where credit is given in consequence of the undertaking of a third person, in a letter of credit, he should be immediately notified of the same, and of the extent of his liability. *Starkie on Ev. part 4, 649. 2 Taunton, 206. 1 Mason, 323. 7 Cranch, 69.*

7. The guarantor of a draft is entitled to notice of non-payment, unless the drawer is insolvent when the draft becomes due. 2 *Taunton*, 206. *Starkie on Ev. part 4*, 650. WESTERN DIST.
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8. When the draft is for more than the guarantor bound himself, he is not liable even up to the amount which he agreed to guaranty. *Starkie on Ev. part 4*, 250. *Chitty, edit. 1830*, 67.

9. If after a bill, the payment of which is guarantied by a third person, becomes due, the creditor takes a note for the amount, from one of the drawers, and prolongs the time of payment, the guarantor is thereby discharged. *Starkie on Ev. part 4*, 650. *Ibid.* 1389. *La. Code, art. 3032*.

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Bullard, J., delivered the opinion of the court.

This is an action instituted in the Probate Court, against the administrator of A. T. Norwood's estate, in which he claims the sum of five thousand four hundred and seventy-one dollars, for moneys advanced to the intestate in his life-time, for services rendered as commission merchant, for costs paid on acceptances for him, and as guarantor to one Neill, as well as for goods and merchandise sold and delivered to him, from June, 1831, to June, 1832, according to an account current annexed to the petition. That account exhibits a balance on a former account of about seven hundred dollars. It credits the deceased with sundry lots of cotton, sold at different times; and charges him with various drafts and notes paid by the plaintiff, in the course of his transactions with the intestate.

The defendant pleaded the general denial, and judgment being rendered in his favor, for a balance against the plaintiff, the latter appealed.

It appears from the evidence in the record, that the deceased and the plaintiff stood towards each other, for some years, in the relation of principal and factor. The latter received the crops of the former on consignment, for sale, and kept an account current, showing the amounts so received, and the sums paid on the drafts of the deceased, according to the usual course of business between planters and commission

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In an action on an account current founded on a long course of commercial transactions between the parties, in which payments are charged for sums paid to take up drafts accepted by the plaintiff, the possession of the draft by the acceptor is *prima facie* evidence of the payments charged in the account, and may be given in evidence in support of such items in the general account.

The rule that an acceptor of a bill is bound to show not only the drawing and acceptance of the bill and its payment, but that it was put in circulation after acceptance, and that the drawer had no funds in his hands, applies only to cases where the acceptor declares upon a bill of exchange against the drawer.

Where drafts are charged in an account current as paid, to *Guay* and those offered in evidence are payable to *Gray*, if the amounts and dates of the

merchants. The account sued on shows a debit and a credit side, and many of the items of charge against the estate consist of sums paid on drafts and notes taken up by the plaintiff, and the notes and drafts are produced in evidence, as proof of the items of the account.

It is urged by the counsel for the appellee, that the acceptor, in an action against the drawer of a bill of exchange, is bound to show, not only the drawing and acceptance of the bill and its payment, but that it was put in circulation after acceptance, and that the drawer had not funds in his hands. That the drawer is always presumed to have funds in the hands of the acceptor, and that the acceptance itself is evidence of the fact. This rule, to a certain extent, has been recognised by this court. But we are of opinion, that in the course of transactions like those shown between these parties, the possession of the draft by the acceptor, is *prima facie* evidence of payment, to be charged in account current, and may well be given in evidence in support of items in such general account. They are generally drawn in anticipation of produce to be shipped to the drawee, and the application of the strict principle contended for to a case like the present, might be productive of the greatest injustice; and it seems to us to apply only, to cases when the acceptor declares upon a bill of exchange against the drawer. In the case before the court, the execution of the drafts is proved; they are produced by the plaintiff; and a witness, who was the book-keeper, swears to the correctness of the different items of the account as charged.

One of the items charged in the account, is a sum of five hundred dollars, for two drafts paid in favor of J. H. Gray, 8-11th February, 1832. The two drafts adduced in evidence, are dated 8th February, 1831, at twelve months, in favor of J. S. R. Guay. It is contended, that there is such a variance in the name that they were inadmissible in evidence, and a bill of exceptions was taken to the opinion of the court, overruling the objection. The amounts and dates of the drafts correspond with those charged in the account current, and the only difference is in the name of the original holder;

Guay, instead of Gray. The strict rule contended for, applies with greater force in cases where the action is brought directly on the instrument. In this case, the money is charged as paid to Gray, and the draft and endorsement on it, shows that it was paid to Guay. As evidence of a disbursement made on account of the intestate, we think the document admissible, and the variance not fatal.

The estate is charged with a sum of one thousand ninety six dollars seventy-nine cents, as the amount of account of Hardesty and Neill, guarantied by A. T. Norwood. In support of this item of his account, the plaintiff produced two drafts of Hardesty and Neill, making together about that amount and a letter addressed to the plaintiff by the deceased, in which he says, "any thing you can do for the bearer Major S. W. Neill, whom I hereby introduce as my friend, will be done for me, he being a merchant in Clinton," and he adds, "P. S. If you should accept for Mr. Neill for one thousand dollars, I will be bound (by) this note." We concur with the court of the first instance, that the liability of the estate, is not sufficiently proved. It is a settled rule, that guarantees are to be construed strictly. Norwood might have been willing to become the security of Neill, and not of Hardesty and Neill. The engagement was personal, as to Neill, and did not, in our opinion, authorise any advance to a firm, of which he was a partner, on the credit of Norwood. 4 *Cranck*, 224. 1 *Mason*, 368. *Coze's Digest*, 351.

The genuineness of a note of one thousand four hundred dollars, charged in the account, is contested by the administrator. Its execution by the intestate, is positively sworn to by a witness, whose credibility is not impeached. That evidence is opposed by the opinion of two witnesses, who state that the signature differs, in some respects, from the common signature of Norwood. One of them says, that it has no resemblance to the signature of the same party, to certain documents referred to, and filed in the suit. These negative statements cannot outweigh the direct affirmative oath of the witness, who testified that he saw the note signed; and we

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drafts correspond with those charged in the account, they will be received in evidence

A letter of guarantee must be construed strictly to charge the guarantor: so where A recommended B to the credit of C, and the latter made the advance to B and D, as a firm, on the faith of the guarantee: *Held* that the guarantor is not bound thereby.

The testimony of one witness to a signature, who swears he saw the party sign, and whose credibility is not impeached, will not be invalidated by the negative statements on oath of two witnesses made on a comparison of hand writing of the party, and his signature to documents on file in the suit.

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Where the amount of a debt or an agreement to pay money, exceeds the sum of five hundred dollars, the testimony of one witness alone is insufficient to prove such debt or demand.

It is urged, that the first item of the account sued on, is not sufficiently proved by the oath of a single witness, and the defendant relies on the 2257th article of the Louisiana Code. That article declares, that all agreements relative to personal property and all contracts for the payment of money, when the value does not exceed five hundred dollars, which are not reduced to writing, may be proved by any competent evidence. Such contracts or agreements above five hundred dollars in value, must be proved at least by one credible witness and other corroborating circumstances. The counsel for the plaintiff endeavors to establish a distinction between an agreement to pay money, and proof of the balance of an account on settlement; and contends, that the silence of the intestate, when the account was rendered showing a balance of seven hundred and forty-three dollars, proved by a single witness, is sufficient evidence of such balance. We cannot adopt this reasoning; proof of a state of indebtedness, from which an agreement to pay is a legal inference, is in substance proof of the agreement itself, and where the amount exceeds five hundred dollars, the testimony of a single witness is not sufficient. But, he further contends, that the evidence is corroborated by a circumstance shown on the trial. That the defendant produced on the trial a letter, which is in the record, from the plaintiff to the intestate, in which the existence of this balance is mentioned as the reason for not accepting a draft at sight, drawn on him by Norwood. The letter is of a date prior to the one on which the balance is charged, and the alleged balance is not the same. This, therefore, is not, in our opinion, a fact which goes to prove that the balance claimed was due, as charged. This item of the account, must therefore, be rejected.

In the progress of the trial, the defendant offered in evidence certain letters and accounts of sales from the plaintiff, of a date anterior to the first item of the account sued on. Their introduction as evidence was opposed, on the ground that they were irrelevant, and a bill of exceptions taken to

their admission, as documents emanating from the plaintiff, and relating to the money transactions of the parties, we think them admissible. But the plaintiff cannot be charged with the amounts of sales shown, because, although the evidence of Harvey may be insufficient to prove a balance on settlement afterwards, so as to enable the plaintiff to recover that balance, yet it suffices to show that the funds received previously to that date, had been accounted for. Proof of payment is not proof of a contract. If the defendant seeks to charge the plaintiff for cotton sold on his account, prior to the 3d June, 1831, he is repelled by evidence that a settlement of the account took place at that time, which resulted in a balance in favor of the plaintiff. The record is full of evidence, that an account current did exist between the parties, in relation to the sale of produce, and the witness proves that a settlement took place at a particular time.

It is further contended by the defendant, that in relation to the two notes sued on, the plaintiff, who was the original payee, and appears to have endorsed them, cannot recover without showing a re-transfer to himself. Both the notes were drawn by Norwood in favor of the plaintiff, and by him endorsed in blank, and both show a subsequent endorser in blank. This court has held, that re-possession of a note once specially endorsed by the payee, is not evidence of title, but that it is, if the transfer is in blank. 7 *Martin, N. S.* 353.

Parole evidence to prove an agreement to pay interest at ten per cent., is clearly illegal and inadmissible.

Rejecting the first item as not proved, the amount charged on the guarantee, and the interest account, there appears to us to be a balance fairly due to the plaintiff, of three thousand four hundred and thirty-five dollars and twenty-eight cents.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be avoided and reversed, and that the plaintiff and appellant recover of the defendant, as administrator of the estate of A. T. Norwood, deceased, the sum of three thousand four hundred and thirty-five dollars and twenty-eight cents, with costs in both courts.

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Accounts and letters relative to sales made by the plaintiff, and rendered to the defendant anterior to the date of the first item of the account sued on, are admissible in evidence; because, it may also be shown that a subsequent settlement took place, and the moneys arising from such sales were accounted for.

The re-possession of a note once specially endorsed by the payee, is not evidence of title to it, but that it is, if the transfer is made in blank.

Parole evidence to prove an agreement to pay interest at ten per cent. is clearly illegal and inadmissible.

WESTERN DIST. defendant appealed from the judgment rendered thereon.
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When this cause came back the second time, it was tried on a mass of evidence, taken under commissions, and in open court, besides the original titles of the contending parties.

The jury returned a verdict for the plaintiff, designating the boundary line between the parties, in reference to a diagram on file.

The defendant's counsel moved the court to grant a new trial, on the following grounds :

1. The verdict of the jury, appears clearly contrary to law and evidence.
2. The defendant has discovered, since the trial, evidence important to the cause, which he could not with due diligence, have obtained before.
3. That manifest injustice has been done in the case, by the verdict of the jury.

The defendant's affidavit, setting forth the newly discovered evidence in detail, was filed, with the affidavit of the parish surveyor ; the principal fact disclosed, was the alleged discovery of the true corner tree, which would materially change the boundary between the parties.

The plaintiff, in answer to the motion for a new trial, alleged that the evidence, pretended to have been discovered, since the trial, is unimportant, and if true, could in no manner affect the verdict, &c. Testimony was taken on the issue made for a new trial.

The district judge was of opinion, no counter affidavits or evidence could be received on a motion for a new trial ; and overruled the motion accordingly. The defendant's counsel excepted to the judgment of the court, rejecting counter affidavits and testimony offered, pending the motion for a new trial.

Judgment was rendered on the 21st December, 1826, confirming the verdict, establishing the boundary line between the plaintiff and defendant, in favor of the former, and that he recover all the land occupied by the defendant, north of

said line, and be put in possession thereof. From this judgment, the defendant again appealed.

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During the trial, there were several bills of exception taken, and those that were relied on, in this court, are fully stated in the opinion given in the cause ; as also the original Spanish and other titles, offered in evidence.

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Turner, for the plaintiff.

Downs, for the defendant.

1. A new trial ought to have been granted on the grounds prayed for.
2. There was error in the opinion of the court, refusing to permit the surveyor to state, where he thought the line ought to run.
3. The fallen gum is the true corner, and gives the defendant all he contends for.
4. There is a surplus in the land to be divided, and this will give the defendant more than he has occupied or claimed.
La. Code, 847.
5. Prescription must govern this case, and which operates favorably to the pretensions of the defendant. *La. Code*, 848.

Bullard, J., delivered the opinion of the court.

This case has been twice before this court, on appeal, and two successive judgments have been reversed, one in favor of the defendant, and the other in favor of the plaintiff. On the last trial in the court below, the jury established a boundary between the adjoining tracts of land, held by the parties respectively, of which the defendant complains, and he asks a reversal of the judgment pronounced thereon.

The action appeared to the court before, as it appears now, essentially petitory, and consequently the plaintiff cannot recover any part of the land in possession of the defendant, which is covered by the defendant's title, and which is not shown to be embraced within the limits of the patent, held by the plaintiff.

The titles of the parties are of equal dignity, and that of the defendant the oldest. The patent in favor of W. P.

In a petitory action the plaintiff cannot recover any part of the land in the possession of the defendant, which is covered by his title, and which is not shown to be embraced within the limits of the patent under which the plaintiff holds.

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Collins, which is admitted to be the defendant's title, calls for a superficies of six hundred and forty arpents, having a front of sixteen arpents on the Bayou Sarah, by a depth of forty arpents, bounded on the south by Bernard Higgins, and on the north by John Collins. That of John Collins, under whom the plaintiff holds, is for eight hundred arpents, having a front of eighteen arpents on the Bayou, and a depth of forty three arpents and six perches, or six-tenths of an arpent, bounded on the south by W. P. Collins, and on the other sides by vacant land, at the time the primitive title was granted. The side lines of both patents, are represented on the figurative plans, made by Trudeau, as parallel to each other, and running due west from the Bayou.

It is apparent, from a simple inspection of the titles, and the plats of survey, returned under the order of the District Court, that the line C D, fixed by the jury as the dividing line between the two patents, cuts off a part of the defendant's land, and gives to the plaintiff more land than he is entitled to, under the patent of John Collins, as surveyed by Trudeau, beginning at Lytels on the south.

It is suggested to us by counsel, that there is evidently between Lytels and Higgins, more land than is embraced in the two patents, and that an equitable division ought to be made of the surplus, between the parties. If this was simply an action of boundary, perhaps in the absence of proof of a consensual boundary, and the uncertainty as to the lines really made by the Spanish surveyor, we might think ourselves authorised to take that course. Much of the litigation in this case, has probably arisen from a vain search for a common corner, to the two patents, on the back parts of the tracts. Such a corner cannot exist, because the tracts have unequal depths. All the evidence therefore, which has been given, leads to no satisfactory results. We have not before us such data, as will enable us to decide definitively between the parties, as to the true division line, and can only say, that the line settled by the judgment below, is in our opinion, inconsistent with the written titles, exhibited by the parties. It appears, that the plaintiff is in possession, under

the patent, of all the land north of Lytel's land, as represented by Trudeau, which in fact, is a greater extent than is expressed in his patent, if he recovers according to the judgment rendered in this case.

Our attention is called to a bill of exceptions, to the opinion of the district judge, who refused to permit a certain question to be put to a parish surveyor, who was called as a witness. The question proposed, and objected to, was in the following words: "Were you called upon as a surveyor of the state, to fix the boundaries between the parties, under the provisions of the Civil Code, where would you establish it, with the lights before you."

We are of opinion that the District Court did not err, in refusing to permit such a question, to be answered by the witness. The answer to it would have been to decide the controversy between these parties, as well questions of law as of fact, and to cut at once the knot, which courts and juries had laboured years to untie. If the answer to such a question, were legal evidence, it would be binding on this court, and a judgment, disregarding it, would be clearly contrary to evidence. Professional men are sometimes called to testify, and their opinions are evidence. The surgeon who states, that a certain wound, in his opinion, produced death, speaks of the effect which would probably result from a given cause, according to his knowledge of anatomy, and his professional experience. The effect already exists, and his opinion is asked only as to the probable cause. But the surveyor was asked, not whether a plat had been drawn, according to the principles of his art, but what line ought to be established, according to the Civil Code. Surveyors may properly be questioned, as to the appearance of old lines, marks upon trees, and their opinion as to the age of certain marks upon trees, and similar facts, connected with their profession. The same objection exists, though not to the same extent, to the question propounded to another witness, who was a surveyor under the United States.

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BOWMAN
VS.
FLOWER.

In a suit involving the question of limits and boundaries between two tracts of land, where the parish surveyor, called as a witness, was asked the following question: "Were you called upon as a surveyor of the state, to fix the boundaries between the parties under the provisions of the Civil Code, where would you establish it, with the lights before you?" *Held*, that the question was illegal, as the answer would have been to decide at once, the controversy between the parties, as well questions of law as of fact, and cut the knot which courts and juries had labored years to untie.

Surveyors when called as witnesses may properly be questioned as to the appearance of old lines, marks upon trees and their opinion as to the age of certain marks on trees, and similar facts connected with their profession.

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LANOUE
vs.
REED ET ALs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, the verdict set aside, and the case remanded for a new trial, the costs of appeal to be paid by the appellee.

LANOUE vs. REED ET ALs.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Where a married woman is sued as heir, it is necessary that the husband be cited to assist his wife, in defending the suit.

So where the wife as heir, was sued together with her husband, and the citation of appeal is directed to her alone, although served on the husband, the appeal will be dismissed, for want of legal citation.

This suit was instituted against John Reed, testamentary executor of Mrs. Sarah Rowell, deceased, for the rescission of the sale of three slaves, which the plaintiff purchased at the sale of the succession of Mrs. Rowell. The plaintiff prays, that the executor and Mrs. Mary Pierce, wife of Constantius Pierce, assisted by her husband, be cited &c. The citation in the District Court, was issued and directed to the executor, and *Mrs. Mary Pierce, wife, &c.* On the trial, the defendant had judgment, and the plaintiff appealed. The citation of appeal was directed to Reed, the executor, and to *Mrs. Mary Pierce, testamentary heir of Mrs. Sarah Rowell, deceased, wife of Constantius Pierce, &c.,* and served on Reed and "*C. Pierce in person.*" Pierce, the husband, was not directed, in the body of the citation, to *be cited*, although the sheriff made personal service on him alone.

A. N. Ogden, for the defendants and appellees, moved to dismiss the appeal on the following grounds :

1. That Constantius Pierce, the husband of Mrs. Mary Pierce, one of the appellees, has not been cited and made a party to the appeal, as is required by law.

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August, 1894.

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VS.
NETTLES.

2. That the certificate of the judge, that the evidence found in the record, is conformable to his notes of the same, is insufficient, the evidence not having been taken down in writing, by the clerk of the court, and there being no statement of facts, bill of exceptions, or errors, assigned.

Brunot, contra.

Mathews, J., delivered the opinion of the court.

The appellees move to dismiss this appeal, on the ground of want of legal citation.

The suit is brought against an executor, and a testamentary heir; the latter being a married woman, was sued together with her husband. He is not cited in the appeal, which ought to have been done, being a party to the suit, necessarily made so, to protect the interest of his wife.

Where a married woman is sued as heir, it is necessary that the husband be cited to assist his wife in defending the suit.

So where the wife as heir, was sued together with her husband, and the citation of appeal is directed to her alone, although served on the husband, the appeal will be dismissed for want of legal citation.

It is, therefore, ordered, that the appeal be dismissed, at the cost of the appellant.

BURROUGHS vs. NETTLES.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING

In a suit between the transferee and the maker of a promissory note, where the answer alleges fraud and collusion, between the payee and transferor of the note and the plaintiff, parole evidence of the acts of the former is clearly admissible against the latter, if the collusion is established.

WATKIN DIST.
August, 1834.

BURROUGHS
vs.
NETTLES.

And where the jury are to pass at once on both the *plea* of collusion and the acts of the transferor, charged with colluding with the plaintiff, the evidence relating to these two points, must be administered simultaneously.

On the score of irrelevancy, the objection to testimony is seldom of any avail in the Supreme Court.

The promise of the vendor of a slave, to rescind the sale on account of redhibitory defects, is admissible in evidence, in a suit between the transferee of a note and the maker, for the price of the slave, to show the existence of the redhibitory defects.

Where the day of payment of a note is past, at the time of its transfer, it is a sufficient warning to whoever receives it, that the maker may have some just reason to withhold payment, as he has a right to any equitable defence after the transfer, which he might have successfully urged before.

A note payable on demand, may be sued upon immediately, or pleaded in compensation.

A verdict found on the plea of fraud and collusion, is entitled to particular attention, because they are the objects for the cognizance of the jury.

This is an action on a promissory note, of the following tenor: "\$675. On demand, I promise to pay A. C. M'Daniel or bearer, the sum of six hundred and seventy-five dollars, for value received, this 22d day of April, 1833.

"James Nettles."

"I transfer the within note to Henry Burroughs, for value received, this 1st day of June, 1833.

"A. C. M'Daniel."

The plaintiff alleges, he has made an amicable demand, upon the maker of the note, of payment, which has not been complied with; he, therefore, prays judgment for the amount thereof, and interest from judicial demand.

The defendant pleaded a general denial, and that said note was never *bonâ fide* transferred to the plaintiff; that he gave no valuable consideration therefor; that it was not transferred at the time it purports; and that it was never in the possession of the plaintiff, who is neither the legal or equitable holder thereof; that said transfer was simulated and fraudulent, and made with the intent to cheat and defraud this defendant, and deprive him of his equitable

defence against said note, in the hands of the payee; that said note was fraudulently obtained from him without any valuable consideration; that said M'Daniel agreed to sell him a negro man, by the name of Hector, for the amount of the note, but failed to make any title and had none himself, the negro being the separate property of his wife. He further states, that in pursuance of an agreement to cancel the sale, he returned the slave to M'Daniel, who appointed a time to meet him and deliver up the note, and failed; that said slave was discovered to be afflicted with a redhibitory disease, of which he has since died, &c.; that the plaintiff participated in the fraud practised in this case, and was cognizant of all the facts at the time of this pretended transfer.

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BURROUGHS
vs.
NETTLES.

The defendant avers, that he has been put to much trouble and expense by the proceedings against him, and sustained damages to the amount of eight hundred dollars; wherefore he prays judgment that his note be given up or cancelled, and for damages and costs.

The plaintiff introduced in evidence the deposition of Sarah Wisdom, taken under a commission, before a justice of the peace. She declares, the note of Nettles was given in part payment of the price of several slaves, sold by Elizabeth Burroughs to Jane M'Daniel, the former the wife of the plaintiff and the latter the wife of the transferor of the note. Witness saw M'Daniel endorse the note to plaintiff, at or about the time it bears date; that plaintiff sent the note to Nettles for payment by M'Daniel; heard M'Daniel tell plaintiff it was not paid, and the latter told him to put the note in suit for collection. Witness knows the note was given by Nettles to M'Daniel for a negro man, named Hector, whom she knew to be healthy and sound at the time.

Dr. Skipwith was called by defendant, about the 6th September, 1833, to see Hector, who was sick. "Defendant said, the negro had been sent back to him by M'Daniel, and he was determined not to keep him."

The defendant's counsel objected to the reading of Sarah Wisdom's deposition, on the ground that some of it was hear-

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**SUBPOENAS
IN
REPLEVIN.**

say, and that it was not the best evidence the case admitted of. The court admitted it, and a bill of exceptions was taken.

The cause, on these pleadings, and the evidence adduced by the parties, was submitted to a jury, who found a verdict for the defendant. From the judgment rendered thereon, after an unsuccessful motion for a new trial, the plaintiff appealed.

Lawson, for the plaintiff.

1. The evidence shows, the note in suit was executed the 23d April, 1833, in favor of M'Daniel, or *bearer*, who on the 1st June of the same year, transferred it to the plaintiff, in part payment of the price of some negroes, purchased by *his wife* from the plaintiff's wife.

2. This court must either reject the testimony excepted to, and remand the cause for a new trial, or reverse the judgment and give one for the plaintiff.

3. The court erred in permitting improper and illegal testimony to go to the jury.

4. The court suffered matters and things between other parties to be given in evidence against the plaintiff in this suit, and permitted the witnesses to detail to the jury hearsay evidence, and testimony irrelevant to the issue.

5. The court erroneously permitted the defendant to give parole proof of a verbal agreement made by defendant and M'Daniel, to rescind the sale of the slave and cancel the note, two months after it was transferred to the plaintiff. 4 *La. Reports*. 64, 90, 166.

6. The judgment ought to be reversed; the execution and assignment of the note for a valuable consideration, is admitted and proved. The defendant has failed to show the slave was afflicted with a redhibitory disease, and he has failed to show fraud and simulation.

7. Without fixing a knowledge of fraud on the plaintiff, it could not be legally urged in bar or avoidance of his rights, though established against the transferor of the note, which is not done in this case. *Chitty on Bills*, edit. 1830, p. 70, 67, note 1 and 9—400-1.

Andrews, contra.

WESTERN DIST.
August, 1854.

BURROUGHS,
vs.
NETTLES.

Martin, J., delivered the opinion of the court.

This is an action instituted by the holder and *transferee* of a promissory note, payable to bearer, against the defendant, as the drawer and maker thereof. The latter pleaded a general denial; and fraud and collusion between the payee and *transferor* of the note, and the plaintiff; and also the failure of the consideration for which the note was given, it being originally given for the price of a slave, who was attacked with a redhibitory disease. He likewise prayed for a rescission of the sale. There was a verdict, and judgment rendered thereon for the defendant; from which, after an unsuccessful effort to obtain a new trial, the plaintiff appealed.

The record of the case shows, that the note was given on the 22d of April, 1833, and made payable to A. C. M'Daniel or bearer, who on the 1st day of June following, transferred it by a written transfer to the plaintiff, in part payment of several slaves, purchased by the wife of M'Daniel, from the wife of the plaintiff. The transfer was made by the delivery of the note, accompanied by a written assignment on the back of it. It is shown that the slave was attacked with a redhibitory disease, and shortly after returned to the vendor, who refused to receive him. He soon after died, in the possession of the defendant.

Our attention is first drawn to a bill of exceptions, taken by the plaintiff and appellant's counsel, to the admission in evidence of the testimony of W. Waddle, S. Nettles, W. Nettles and John Nettles, which testimony was taken down by the clerk, on the ground that what they related, was *res inter alios acta*. 2. That the testimony is irrelevant, or founded upon hearsay. *Lastly*, it is opposed on the ground of an attempt made to give parole evidence of the cancelling or rescinding the sale of a slave. The court overruled the objections, on the ground of the plea of fraud and collusion.

The answer, alleging collusion between the plaintiff and the payee, who transferred the note, clearly authorises evidence of the acts of the latter to be given against the former,

In a suit between the transferee and the maker of a promissory note, where the answer alleges fraud and collusion between the payee and transferor of the note and the plaintiff, parole evidence of the acts of the former is clearly admissible against the latter, if the collusion is established.

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BURROUGHS
vs.
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And where the jury are to pass at once on both the plea of collusion and the acts of the transferor, charged with colluding with the plaintiff, the evidence relating to these two points must be administered simultaneously.

On the score of irrelevancy, the objection to testimony is seldom of any avail in the Supreme Court.

The promise of the vendor of a slave to rescind the sale on account of redhibitory defects, is admissible in evidence, in a suit between the transferee of a note and the maker, for the price of the slave, to show the existence of the redhibitory defects.

Where the day of payment of a note is past at the time of its transfer, it is a sufficient warning to whoever receives it, that the maker may have some just reason to withhold payment, as he has a right to any equitable defence after the transfer which he might have successfully urged before.

if the collusion was established. And as the jury was to pass at once, both upon the plea of collusion and the acts of the transferor of the note, evidence relating to these two points, was to be administered simultaneously. On the score of irrelevancy, the objection to testimony is seldom of any avail in this court. Irrelevant testimony is easily rejected, and has no other effect than to cause a loss of time. It often happens that, in order to illustrate the fact to which he deposes, a witness is necessarily led into the detail of circumstances, and the information which he has received in relation to it. In such a case, if the party against whom the witness is introduced, apprehends danger, he may warn the jury of the obligation they are under to disregard hearsay testimony, and if necessary, call on the court to instruct the jury accordingly.

The promise of the vendor of the slave, for which the note was given, to rescind the sale and return the defendant's note, if not admissible to support a demand for the rescission of the sale thereon, may be received to establish the admission of the vendor of the existence of a redhibitory vice. It does not appear to us, that the District Court erred in admitting the evidence.

On the merits: if the note was still in the possession of the vendor and payee, there cannot be the least doubt but that the evidence adduced would discharge the defendant from the obligation of payment. His counsel has concluded that the same consequence follows in the present case:

1. Because the note, having become the property of the plaintiff after the day of payment was passed, he holds it subject to every equitable plea or defence that might be opposed to his transferor.

2. Because the evidence shows, that the plaintiff colludes with his transferor to deprive the defendant of the means of a defence, which would be destroyed by a fair transfer of the note to a party without notice.

I. The circumstance of the day of payment of the note being past, at the time of transfer, is a sufficient warning to whoever received it, that the maker may have some just reason to withhold payment, since it is held he has a right to

any equitable defence after the transfer, which he might have successfully urged before. A note payable *on demand*, may be sued upon immediately by the legal holder; or may be pleaded in compensation: yet, in the usual course of affairs, it is not expected to count on instant payment. Hence, if it be offered to be transferred shortly after its date, the circumstance of its having been the object of an instant call for payment, does not necessarily present the same degree of suspicion, if any, as in the case of a note payable on a given day, which is already past.

We, however, refrain from expressing any opinion on the first point, because that which we have formed on the second, renders it unnecessary.

II. The jury have passed upon the plea of fraud and collusion, and found in favor of the defendant. A verdict on these pleas is entitled to the particular attention of this court, because they are the peculiar objects of the cognizance of a jury. They often require the weighing and comparing of a number of circumstances apparently of a trivial nature, which, separately viewed, appear very unimportant; but which circumstances, when brought together and compared with each other, acquire weight, which destroys the equilibrium that kept determination in suspense. A knowledge of all the circumstances, their nature and the standing and character of the witnesses and parties, is often of incalculable utility.

Collusion in this case, is charged on persons nearly connected by affinity; who lived in the same neighborhood, and who appear both to have had an intimate knowledge of the details of the transaction, in which the note originated. The transferee or plaintiff, is stated to have employed the *transferor* as his agent in the prosecution of this suit, and the latter after the transfer, appears to have considered himself as still the owner of the note, and he appears to have retained the possession of it. He declared his intention after the transfer, to claim interest at the rate of ten per cent. The counsel for the defendant states, that the transferee prosecutes the present suit, by the agency of the transferor. In support of this charge they

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A note payable on demand may be sued upon immediately, or pleaded in compensation.

A verdict found on the plea of fraud and collusion is entitled to particular attention, because they are the objects of the cognizance of the jury.

WESTERN DIST. show that the latter sent a young woman, who resides in his
August, 1834. house, to an adjoining parish, to be examined as a witness,
 with a view of dispensing with her examination in court.
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vs. Under all the circumstances of the case, we are unable to
HUDSON ET AL. say the jury came to a wrong conclusion in forming their
 verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

GREEN vs. HUDSON'S SYNDICS.

**APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE
 JUDGE THEREOF PRESIDING.**

Proof of possession, is indispensable to support a title, based on the plea of prescription.

The vendor, from whom the defendant's title is derived, is an incompetent witness, to prove the possession of the latter, so as to form the basis of a title, by a prescription.

The vendor is an incompetent witness, on the ground of interest, for a party deriving title from him, even when his deed to his vendee, contains no clause of warranty.

The vendor is bound in warranty to his vendee, when his deed of sale does not exclude it. His obligation extends at least so far, as to require him to refund, with interest, in case of eviction.

This is an action, instituted to obtain a remuneration in damages, and a partition of a tract of seven hundred and twenty arpents of land, which the plaintiff alleges he purchased, in conjunction with one R. C. Walker, at the probate sale of the succession of Mrs. Sarah Rowell, deceased, situated on the Mississippi River, at the mouth of Sandy

Creek, in the parish of East Feliciana. The plaintiff further alleges, that since the purchase, Walker has sold and conveyed his interest, in the said tract of land, to James Hudson, of West Feliciana. That he has himself, since said purchase, sold one-half of his interest in the premises, to one J. C. Walker, who, together with Hudson, is in possession of the *most valuable* part of the land. He urges, that in consequence of said possession, he is entitled to remuneration, from his said co-proprietors, Hudson and Walker, which he estimates at ten thousand dollars; and prays for a partition of the land, and judgment for the difference in value of that portion held by Hudson and Walker, against them, according to his estimate as alleged; and for damages for the use and occupation of the premises, by them.

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Hudson, having made a *cessio bonorum*, syndics were appointed to represent his estate. The syndics, after their appointment, prayed *oyer* of all the papers and documents, on which the plaintiff relies, in support of his title, to the land claimed in the petition. The documents comprising the proceedings of the Probate Court, and sale of the land, were ordered to be exhibited, and the prayer, as to the remainder, was overruled by the court. The defendants excepted to this part of the opinion of the court.

The plaintiff filed a declaration, in writing, stating that the sale from him to Walker, was cancelled, and that he claimed one moiety of the land in contest, under purchase at probate sale.

Hudson's syndics answered to the merits. They averred that Hudson held two hundred and ninety-eight acres of the tract of land in question, under an outstanding title, adverse to that derived from the probate sale, and under which the plaintiff claims; which was derived from a sheriff's sale, for taxes due on said land, by one Samuel Moore, made the 29th June, 1818, and which was purchased by one J. P. Michel, who sold and conveyed it to R. and J. Caruthers, by a deed *without clause of warranty*, and who sold it to the insolvent Hudson. The syndics further aver, that the plaintiff cannot maintain his action of partition, until the

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title to the two hundred and ninety-eight acres is first settled. They pray judgment, recognizing this title, and that the plaintiff's suit be dismissed.

The syndics also pleaded a general denial, to all the plaintiff's claim, embraced by the two hundred and ninety-eight acre tract, and prescription of ten years continued possession, under a good and legal title.

On these issues, the parties went to trial. In order to support the plea of prescription, the defendants' counsel offered Michel, the purchaser of the two hundred and ninety-eight acres of the disputed premises, at sheriff's sale, to prove possession in the defendants. The introduction of this witness, was opposed by the plaintiff's counsel, on the score of interest. His competency was urged, on the grounds that he sold and conveyed the land in contest, to his vendee, by a deed without warranty, and that he was not thereby responsible in warranty. The court received him, and the plaintiff's counsel took his bill of exceptions to the decision, admitting the witness. The plaintiff finally obtained judgment, from which the defendants appealed.

Lawson and Ripley, for the plaintiff.

Downs and Saunders, for the defendants.

Mathews, J., delivered the opinion of the court.

In this case, the plaintiff alleges, that he has title to an undivided half of a certain tract of land, as described in his petition, containing seven hundred and twenty arpents, and that the defendants are joint owners with him, of the other moiety of said land. Partition is prayed for, in conformity to the alleged rights and claims of the parties.

On the part of the defendant Hudson, a title is set up to two hundred and ninety-eight acres, being a part of said tract of seven hundred and twenty arpents, derived from a source different, and independent of the title alleged by the plaintiff, and pleads a right by prescription, &c. The original document of title, offered in support of the prescription pleaded, is

a deed made in pursuance of a sale for taxes, wherein the assessment was made against one Samuel Moore, on a tract of land supposed to contain three hundred and fifty-six acres, a part of which was sold, amounting to two hundred and ninety eight acres, to a certain John P. Michel, who bid the amount of taxes and costs, for this portion of the whole land assessed. Michel afterwards sold to Richard and John Caruthers, who sold and conveyed to the defendant Hudson. The deed from Michel to his vendees, contains no clause of warranty, neither is there any clause which excludes it.

Judgment was rendered in the court below, in favor of the plaintiff, from which the defendants appealed.

The pleadings in this case, clearly involve a question of title. The basis of that set up on the part of the defendants, is prescription. To support a title of this kind, proof of possession is indispensable. In order to establish this fact, they offered as a witness, Michel, from whom the title under which they claim, is derived, who was objected to, as incompetent by the plaintiff; he was, however, received by the court, and a bill of exceptions taken. The witness thus offered, is clearly incompetent, on the ground of interest. He is bound in warranty, on his deed to the Caruthers, for that act does not exclude it. His obligation extends, at least, to require him to refund the price, with interest, (if no further) in the event of eviction. See *La. Code, art. 2476, et seq.*

The judge below erred in admitting the witness. And as it is possible, that the defendants might have proven the fact of possession by other testimony, if they had not been led into error by the decision of the judge *a quo* in allowing their witness to testify who was legally incompetent. Under these circumstances, we think the cause ought to be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled, and that the cause be sent back to said court, to be tried *de novo*. The appellee to pay the costs of this appeal.

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Proof of possession is indispensable to support a title based on the plea of prescription.

The vendor from whom the defendant's title is derived is an incompetent witness to prove possession of the latter, so as to form the basis of a title by a prescription.

The vendor is an incompetent witness on the ground of interest, for a party deriving title from him, even when his deed to his vendee contains no clause of warranty.

The vendor is bound in warranty to his vendee, when his deed of sale does not exclude it. His obligation extends at least so far as to require him to refund with interest in case of eviction.

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GEORGE vs. M'NEILL ET ALS.

GEORGE
vs.
M'NEILL ET ALS.

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, THE JUDGE
OF THE FOURTH (THEN JUDGE WATTS,) PRESIDING.

A mandatory is not considered to have exceeded his authority, when he has fulfilled the trust confided to him, in a manner more advantageous to his principal, than that expressed in his appointment.

The circumstance of the factor, being a creditor of the consignee or owner, and the necessity of his advances being covered, will not of itself justify a sale below the limited price.

So where twenty bales of cotton were consigned, and limited to be sold for nine and a half cents, or *more*, and without further instructions, the factor or agent sells at seven and eight and a half cents per pound; and it is proved, that a higher price than that at which the cotton was sold, could not be obtained; and when it also appears, that this was the highest market price, obtainable at any time between the sale and the inception of suit, the price at which the cotton actually sold, is all the principal or owner can recover.

This is an action, instituted by the owner, to recover from the factors, the sum of seven hundred and eighty dollars ninety cents, as the price and proceeds of twenty bales of cotton, consigned for sale at the limit of nine and a half cents per pound, according to the following receipt:

"Received of John George, twenty bales of cotton, marked J. G., from one to twenty, for sales and returns at *nine and a half cents, or more*. May 28th, 1831."

"John T. McNeill, & Co."

Notwithstanding this agreement, the defendants, through their agents, Hagan, & Co., sold the cotton in July following, below the limits; eight bales at seven and three-fourth, and twelve at eight and three-fourth cents per pound. This suit is brought to compel them to account to the plaintiff, at the *limit price*. There is no allegation in the petition, and no attempt on the trial, to prove that cotton of like quality of that of the plaintiff, sold between the date of the agreement, and the institution of suit, at nine and a half cents, or for any higher price, than that stated in the account of sales.

The defendants pleaded a general denial ; and that they were always ready to account, and pay over the proceeds of said cotton, at the price for which it sold ; or if the plaintiff was dissatisfied with the sale, they would replace it with other cotton of a similar sample. They further state that the cotton was never worth the limit, and that the price at which it sold, was more than it was worth. They also set up several sums, amounting to three hundred dollars, which they plead in compensation of the plaintiff's demand.

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H'KILL ET AL.

It appeared in evidence, that the cotton was held up until late in the season, to obtain the limited price, but the market not allowing it, sales were made at the prices stated in the account of sales, without further instructions from the owner.

Upon these issues and facts, the parties went to trial. The district judge, who presided at the trial, instructed the jury, "that there was a plain violation of the contract, on the part of the defendants, but that before the plaintiff could recover against the defendants, any thing beyond the actual proceeds of the cotton, it was incumbent on him to allege and prove, that he had sustained damages, by such violation of the written agreement ; that if at any time, between the date of the contract, and the institution of the suit, cotton of similar quality with plaintiff's, had sold for ten, fifteen, or twenty cents per pound, and he had alleged and proved this fact, he would be entitled to recover the difference between the actual sales and such price ; but that in this case the plaintiff had not done so, he had no right to recover beyond the balance in defendant's hands, after allowing the claims pleaded and proved in compensation."

The jury returned a verdict for the plaintiff, of four hundred and thirty-nine dollars thirty cents, after deducting the defendant's claims, set up in compensation, but at the same time, charging them with the cotton, at the rate of nine and a half cents per pound.

Both parties were dissatisfied with the verdict, but the court considered, as the defendants acted incorrectly, in violating an express agreement, when they could easily have

WESTERN DIST. consulted the plaintiff, and still retained the proceeds of the cotton in their hands, that the verdict had done no more than substantial justice, although contrary to the principles of law, given in the charge, *denied a new trial*. From the judgment rendered on the verdict, the defendants appealed.

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VS.
M'WILL ET AL.

Lawson, for the plaintiff

1. When there is a special agreement between the principal and factor, that the consigned property shall not be sold under a limited price, the consignee violates that agreement, if he sells under that price, and the principal can recover the limit price stipulated, or ascertained damage, on alleging and proving the violation of that contract. *La. Code, art. 1928, 2979, 2980. 2 Pothier, on Ob. 93, 98. 1 Mass. Reports, 27, 54, 268.*

2. The defendant violated his contract, by substituting other persons to sell the cotton, and is liable for his sub-agent's acts. *1 Livermore on Agency, 54, 64, 66, 381.*

3. When the power of a factor is limited by instructions, he is bound to pursue those instructions. If he deviate from his orders, though with a view to his employer's interest, he will be liable for the consequences. The loss sustained by the principal, is the measure of damages, which he is entitled to recover against his factor. *1 Livermore on Agency, 368, 369, 342, 398, 403.*

4. The rule of law is, that the consignor of goods, limiting the price at which the factor may dispose of them, and the factor violates his instructions by selling them for less, the consignor is entitled to recover, not only the amount for which the goods were sold, but also the difference between that amount and the price limited. *1 Livermore on Agency, 380, 385.*

5. The jury erred in admitting the demand pleaded in compensation. There is no evidence, that plaintiff ever accepted the draft drawn on him, or agreed to pay the notes pleaded in compensation. The judgment of the court *a qua* ought to be amended in this respect.

Bradford, for the defendants and appellants.

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1. The appellants were commission merchants in New-Orleans, and as such were the agents of the appellee. An agent can act by a sub-agent, he being answerable for the acts of his sub-agent, to his principal.

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2. In holding and finally disposing of the cotton of the appellee, the appellants used all the care and diligence, which "prudent men" would have been required to have used, to get the best price therefor, which the market would afford.

3. The appellee being the debtor of the appellants, they were justified in making sale of his cotton, after waiting a reasonable time for a rise in the market, to meet the views of their principal.

4. The appellants held on to the cotton, as long as there was reasonable ground to hope for an improvement in the price, and it was incurring continual expense for storage.

The counsel cited to the court, in support of the foregoing points, the following cases from Martin's Reports : *Weems vs. M'Micken*, 7 *Martin*, 54. *Young vs. M'Laughlin et als.* *Ibid.* 628. *Noble vs. M'Micken*, 9 *Martin*, 188. *Madeira et als vs. Townsley et als*, 12 *Martin*, 84.

Martin, J., delivered the opinion of the court.

The sole question which this case presents, is whether a commission merchant, who has sold cotton below the *limited price*, is bound in every case to account for it, at *that price*. Livermore, in his valuable treatise on agency, is said to have laid down the broad principle, that a factor who sells below the limited price, is chargeable with the difference between the price he sold at, and that limited by the owner. *Livermore on Agency*, Baltimore edition, 1 vol. 380, 384.* A copy

*Under the head of "the form of action, which the principal may maintain against his agent, for *nonfeasance, misfeasance, or malfeasance*," Mr. Livermore, in his *Treatise on Agency*, Baltimore edition, at page 384 says :

"As to the general question, I should suppose, that where the factor is positively ordered not to sell the goods under a certain price, his selling

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of this edition of that work, is not within our reach at this place, and the passage cited, has been looked for in vain in the Boston edition, which is the only copy to which we have been able to have access. That this rule is the proper one in most cases, we have no hesitation to admit, but we are equally ready to say, that in some cases, the owner of the goods may justly contend, that this rule affords him but an inadequate satisfaction, while we allow the factor may insist, that it mulcts him in excessive damages, and consequently condemns him to pay damages, when the owner is not entitled to any.

A has a plantation, which is the ancient family seat, and which he estimates at a price, much above the sum that he may reasonably accept. It is the price of affection. At his departure, he directs his agent to sell it, but not below that price, which is the only one that affords him a sufficient inducement, to part with the property, the sale of which, necessity and the situation of his affairs does not demand. The agent is induced, by the desire of obtaining his commissions, or the use of the money, to sell at a good price, but below the limit imposed by the principal. This is perhaps a case, to which the rule invoked from Livermore is applicable, in which the measure of damages, is the difference between the two prices.

them for less, is as much a tortious conversion, as if he had given them away; for though the principal has given him an authority, which, as far as third persons are concerned, will not be affected, by his private instructions; yet as between the principal and factor, it is the same as if he had given no authority, when the limits of the authority have been exceeded, and no discretion was left with the factor. If, as Mr. Justice LAWRENCE seems to think, an action for money had and received, be the principal's only remedy, there certainly would be no use in limiting the factor as to price; since in this action the plaintiff would affirm the sale, and the money actually produced by the sale of the goods, would be all that he could recover. Even if the factor has sold the goods for less than the market price, the principal must submit to the loss, unless he can maintain some other action more favorable to him than this. Nor is the action of trover such as to afford him complete satisfaction. When the price at which goods are to be sold is limited by the instructions given to the factor, these instructions have reference to a certain state of the market. They are not intended to guard

During the invasion of this state by the enemy, in the winter of 1814-15, cotton fell to *six cents*. After the peace, it gradually rose to *thirty*. If during the seige of New-Orleans, a factor had received cotton, with directions not to sell under *six cents*, and after peace was proclaimed, had sold it for *five cents*, while fifteen or twenty cents per pound might have been obtained, the owner of the cotton might have well contended, that his case was one in which Livermore's rule afforded but an inadequate measure of damages: As the object of the limitation, was to fix a *minimum* price, not to absolve the factor from the obligation of consulting his principal's interest, by selling for the highest price he could obtain.

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In the case of a factor, who had sold below the limited price, but who could show that this price was so extravagant, that neither at the time of the sale, or at any period since, it could be obtained: As if after sales at thirty cents, in 1815, a planter in 1816, had sent his crop to market, with directions not to sell under that price, and the factor having sold for twenty cents, it appearing that this was the highest price, that could be obtained at the time of the sale, or at any period between that and the time of instituting suit, the factor

against a sale for less than the current market price, at the time of making the sale; for this is an event not contemplated by the principal, nor is it of frequent occurrence. The object of the principal is to hold the goods, until a favorable state of the market renders it expedient to dispose of them. Of this he is competent to judge; and it is the duty of the factor to conform to his directions; and he is answerable for violating them. But if the principal has directed the factor not to sell the article for less than five dollars, and the factor sells it for four dollars, which is the current market price at the time; an action of trover will not afford satisfaction; for in trover the rule is, that the plaintiff is entitled to damages equal to the value of the article converted, at the time of the conversion. This value is not to be estimated according to the notion the plaintiff may have of it, nor with reference to the state of the market at another time; but must be calculated according to the actual state of the market, at the time of sale. A special action on the case, alleging the *gravamen*, either as a breach of promise, or a breach of duty, would therefore be advisable; and in this action I apprehend the plaintiff would be entitled to recover, not only the amount for which the goods sold, but also the difference between that amount and the price limited."

REPORTER.

WESTERN DIST. might well contend, that the difference of the price of sale, *August, 1834.*

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M'NEILL ET ALIS. measure of damages, while Livermore's rule subjected him to excessive damages.

If in the preceding case, the factor had been drawn on, and accepted drafts for the full amount of the value of the cotton, and showed that the additional cents on the price, were not to be obtained, for even a year after he made the sale; that the protest of the drafts, the interest on money obtained from brokers to redeem them, the storage of the cotton, and its protection from the danger of fire, would all amount to a considerable sum, and render a sale advantageous, although below the limited price, and show that it was beneficial rather than detrimental to the interests of the principal; it is clear the rule invoked would subject the agent to damages, in a case where he was not liable to any.

A mandatory is not considered to have exceeded his authority, when he has fulfilled the trust confided to him in a manner more advantageous to his principal than that expressed in his appointment.

The circumstance of the factor being a creditor of the consignee or owner, and the necessity of his advances being covered, will not, of itself, justify a sale below the limited price.

So where twenty bales of cotton were consigned and limited to be sold for nine and a half cents, or more, and without further instructions, the factor or agent sells at seven and eight and a half

The counsel for the plaintiff and appellee, has referred us to the articles 1928, 2978 and 2980 of the *Louisiana Code*, in support of the rule for which he contends. The first of these articles does not appear to this court, to have any bearing on the question under consideration. The next declares, that the attorney who exceeds his authority, is personally liable, and bound by the contract; and the last consecrates the principle which we think ought to govern this case. It provides, that the mandatory is not considered to have exceeded his authority, when he has fulfilled the trust confided to him, in a manner more advantageous to the principal than that expressed in his appointment.

We have also been referred to authorities found in 1 *Mass. Reports*, 57, 254 and 288, and to *Pothier on Obligations*, 93 and 98. These authorities, as far as we have been able to examine them, do not in the opinion of this court, support the principle, in favor of which they are invoked, and to the extent contended for by the appellee.

The appellants' counsel has presented, as a ground of justification, in behalf of a sale made below the limited price, the circumstance of their being creditors of their principal, and the necessity of their advances being covered. But this justi-

fication cannot, in our opinion, be admitted. The record shows the defendants and appellants have proved, that a higher price than that at which they sold the plaintiff's cotton, could not have been obtained. It does not appear, that at any time between the sale of the cotton, and the inception of this suit, that cotton sold higher.

We therefore conclude, that on the evidence before them, the jury erred in applying the rule contended for by the plaintiff's counsel in this case. But we think justice requires that the plaintiff should have an opportunity of showing, that he was really injured by the sale, being unwilling to pronounce against him, in direct opposition to the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled, avoided and reversed; that the verdict be set aside, and the cause remanded for a new trial; the plaintiff and appellee paying costs in this court.

WESTERN DIST.
August, 1854.

DYER
vs.
SEALS.

cents per pound, and it is proved that a higher price than that at which the cotton was sold could not be obtained; and when, it also, appears that this was the highest market price obtainable at any time between the sale and the inception of suit, the price at which the cotton actually sold, is all the principal or owner can recover.

DYER vs. SEALS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the question is presented, whether a workman who sues on a specific contract for work and labor, can give evidence of the work *really* done, and recover its value, although the job was not completed according to contract, when the employer received the work in an imperfect state, and when sued on the contract, demands damages in reconvention for delay in doing the work, and for its not being done in a workmanlike manner? *Held*, that this case is similar to that of *Loreau vs. Declouet*, 3 *La. Reports*, 1; and that the evidence is admissible, and the employer, having received the work, is bound to pay the value in the condition it is delivered.

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WHITMAN DIST. The plea in reconvention, authorizes the plaintiff to give in evidence the value of the work done for which he sues, to repel the demand for damages against him for the non-performance of his contract.

August, 1834.

DICK

VS.

SEALS.

Where the amount found by the jury was not liquidated at the inception of the suit, *interest* is not allowable by law. The law does not allow interest on unliquidated sums.

Where the verdict and judgment allows interest on an unliquidated sum, the appellee cannot avoid a reversal of the judgment and payment of costs, by filing in the Supreme Court a *remittitur* of the interest so allowed.

The plaintiff alleges, he entered into a written contract with the defendant, to build for him a cotton gin, for which the latter bound himself to pay him the sum of five hundred and fifty dollars. He further alleges, he has performed his part of the contract according to the terms thereof, and completed the gin within the time limited; and that the defendant refuses to pay him. He, therefore, prays judgment for the sum of five hundred and fifty dollars and costs.

The defendant pleads a general denial; admits, and annexes to his answer the written contract to build the gin, but expressly avers that the plaintiff, after commencing the work quit it soon after, and left the country, against the consent and remonstrances of this defendant; that by reason of the misconduct and failure of the plaintiff to build his gin in time for his crop, he has sustained damages to the amount of five hundred and fifty dollars; and that the plaintiff is further indebted to him for various articles furnished, according to an annexed account, amounting to four hundred and nine dollars and twenty-five cents, making in all the sum of nine hundred and fifty-nine dollars; for which he prays judgment against the plaintiff in reconvention.

The plaintiff sued on his written contract, in which he bound himself to build the gin and gin-house for the defendant, by the 1st of October, 1833, unless prevented by sickness, in which case he was to have longer time. The evidence shows, the work was badly done, and the gin not entirely completed. The defendant attempted to gin his cotton on it, but he had

to employ a person to finish and fix the press, before he could press the cotton after it was ginned. The whole evidence showed, the gin was not completed according to the contract. The account of defendant, annexed to his answer, was proved, with the exception of some items, which were stated to be charged too high.

WHITMAN DEVS.
August, 1834.

BYER
VS.
GRAM.

The jury returned a verdict for the plaintiff, in the sum of three hundred and fifty-six dollars, without finding any thing on the plea in reconvention.

The defendant's counsel moved for a new trial, on the following grounds :

1. The jury erred in finding a verdict for the value of the work and labor done, when the suit was brought on a special contract.

2. The verdict is contrary to law and evidence, in not finding or allowing any thing on the plea in reconvention.

3. There was no proof of the value of the work done by the plaintiff.

The motion for a new trial was overruled, and judgment rendered in conformity to the verdict. The defendant appealed.

Lawson, for the plaintiff.

Muse, for the defendant and appellant.

Bullard, J., delivered the opinion of the court.

The appellant relies for a reversal of the judgment on five points, filed in the record.

The three first may be considered together, as presenting to the court the question, whether a workman who sues on a specific contract for work and labor, can give evidence of the work really done, and recover its value, although the job was not completed according to contract, when the employer received the work in an unfinished state, and when sued on the contract demands damages in reconvention, for delay in doing the work and for its not having been done in a workmanlike manner.

Where the question is presented whether a workman who sues on a specific contract for work and labor, can give evidence of the work really done and recover its value, although the job was not completed according to contract, when the employer received the work in an imperfect state, and when sued on the contract, demands damages in reconvention for delay in doing the work and for its not being done in a workmanlike manner? *Held*, that

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August, 1834.

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vs.
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this case is similar to that of *Loreau vs. Declouet*, 3 *La. Reports* 1; and that the evidence is admissible and the employer having received the work, is bound to pay the value in the condition it is delivered.

The plea in reconvention authorises the plaintiff to give in evidence the value of the work done for which he sues, to repel the demand for damages against him for non-performance of his contract.

Where the amount found by the jury was not liquidated at the inception of the suit, interest is not allowable by law. The law does not allow interest on unliquidated sums.

Where the verdict and judgment allows interest on an unliquidated sum, the appellee cannot avoid a reversal of the judgment and payment of costs, by filing in the Supreme Court a *remittitur* of the interest so allowed.

This case is similar, in its essential features, to that of *Loreau vs. Declouet*, 3 *La. Reports*, 1; in which this court held, that in commutation contracts, when the reciprocal obligations are to be performed at the same time or one immediately after the other, if one party goes on to perform his part but does not complete it, as agreed on, and the other receives the thing contracted for, he is bound to pay the value in the condition it is delivered.

The plea in reconvention, authorised the plaintiff to give in evidence the value of the work done, to repel the demand for damages against him for the non-performance of his contract. The jury tried the whole case, and after allowing to the defendant about two hundred dollars, rendered a verdict in favor of the plaintiff, for the balance.

The fourth point made by the counsel for the appellant, is that the verdict of the jury on the plea of reconvention, is contrary to law and evidence. It is urged, that a greater amount of damages was proved, than has been allowed by the jury. One witness, it is true, stated as his opinion that the defendant had suffered greater damage in the loss of an early market, and the fall of price. But the jury was not bound to adopt the opinion of the witness, which may have been formed on taking into view remote consequences which could not have entered into the contemplation of the parties when the contract was made. The jury took into view the limited amount of crop to be ginned, and the delay which occurred, and formed their opinion according to the facts proved on the trial. We are not enabled to say, that their verdict has done evident injustice to the defendant.

The last point appears to us well taken. The amount found by the jury was not liquidated at the inception of the suit, and interest is not by law to be allowed on unliquidated sums. The appellee endeavors to obviate this objection, by filing in this court a *remittitur* as to the interest allowed by the judgment. We are of opinion, that this cannot be done. This court must pronounce on the judgment as it was rendered, independently of any modification of it by one of the parties pending the appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that the plaintiff recover of the defendant and appellant the sum of three hundred and fifty-six dollars, with costs in the District Court ; those of the appeal to be paid by the plaintiff and appellee.

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August, 1834.

MARY, f. w. c.

vs.

MORRIS ET AL.

MARY, f. w. c. vs. MORRIS ET AL.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

In a conflict of laws between two states, where a testator in Georgia bequeathed to certain of his slaves their freedom, to take effect five years after his death, and before the expiration of the five years the testamentary executor brings the slaves to Louisiana, and it is shown that at the time of the *bequest* of freedom, the laws of Georgia prohibited the manumission of slaves, except by application to the legislature : *Held*, that the bequest in the will being prohibited by the laws of the state where it was made, is *null and void*.

The bequest of liberty to slaves which is made in contravention of the law of a state, enacted for the security of the public peace, and good order of the community, is absolutely null and void ; and such slaves do not *ipso facto* become free under the will, on being brought to this state, where slavery is tolerated, but in which slaves may be manumitted by will.

In a suit for freedom, when the question is *libera vel non*, and the plaintiff, being, from her color and the possession of the defendant, presumed to be a slave, the burden of proving freedom devolves on the plaintiff.

This is an action in which the plaintiff claims her freedom. She alleges that she was held in slavery in 1809, in the state of Georgia, by one John Marshall, who in a clause of his will made that year, provided that she should be free on

WESTERN DIST. the first day of January, 1815. The following is the clause
August, 1834. under which she claims her freedom :

MARY, f. w. o. "Conscientiously believing that civil and religious liberty is
vs. the natural right of all men, it is my will, that Jude and her
MORRIS ET ALA. two children, *Mary* and Ellender, with all she may have, and William, be put into the possession of my daughter Merriam Morris, on the first day of January next (1810), to serve her for the space of five years from said date, *and only five years:* then, it is my will, that the said Jude and the above named servants be set free, and they are hereby declared free after serving *said term of time.*" The will is dated "17th March, 1809."

That the said Merriam Morris never informed her of her freedom under said will, but her and her husband brought her to the state of Louisiana, and held her in slavery until the death of the husband, Gerard Morris ; and that she was sold by the administrator of Morris's estate, by public act passed before a notary public in the parish of St. Helena, to Jerry Morris, who died in the parish of East Baton Rouge, and that she and her five children are now detained in *slavery* by the defendant, Leroy C. Morris. She prays for judgment, declaring herself and her five children to be free persons of color ; that the succession of Morris be decreed to pay her two thousand dollars in damages, for the illegal detention of her and her children in slavery ; and fearing she may be taken from the jurisdiction of the court, she prays that she and her children be sequestered.

The defendant pleaded a general denial ; and averred that the clause of the will under which the plaintiff claims her freedom, is utterly null and void by the laws of Georgia ; that by the laws of that state, a slave could be made free only by legislative act on the application of the owner.

The defendant, in a supplemental answer, alleged that Mary and her two children, Gerard and William, were adjudicated to Jerry Morris, whose estate he administers, for the price of nine hundred dollars, at the probate sale of the succession of Gerard Morris. He cites the heirs of G. Morris in warranty.

The warrantors answered, denying the plaintiff's demand, and also denying that they were liable in warranty, &c. WESTERN DIST.
August, 1834.

The plaintiff proved the allegations in her petition, leaving the authority to be set free under the laws of Georgia, to be contested. MARY, f. w. c.
vs.
MORRIS ET AL.

The defendants introduced in evidence an authenticated copy of the laws of Georgia, passed in 1801, relating to the manumission of slaves, and also prohibiting it in any other mode, under a heavy penalty, than by application to the legislature of the state.

The will under which the plaintiff claims, was duly admitted to probate in Georgia, and proved and admitted to record in this state.

The district judge was of opinion, that slaves, being passive in their situation and character, it was the duty of the executor to see the will executed agreeably to the intention of the testator, which he viewed in the light of a contract for freedom; that there could be no doubt under the laws of this state, where she now seeks to enforce it, she is entitled to her freedom: and it also appears, that since the date when she was entitled to her freedom, she has had five children, now living, who are also entitled to their freedom. Judgment was rendered, declaring Mary and her five children free and emancipated. Judgment was also rendered against the warrantors for the price which these persons sold for at probate sale, viz: nine hundred dollars, &c.

The warrantors appealed. In the answer to the appeal by the defendant, administrator of L. C. Morris, &c. he prays the judgment to be corrected.

1. He joins the warrantors in praying for a reversal of the judgment.

2. That it may be corrected, by allowing interest on the price of said slaves, paid to the warrantors, &c.

Brunot, for the plaintiff.

R. & A. N. Ogden, contra.

WESTERN DIST.
August, 1834.

MARY, f. w. c.
vs.
MORRIS ET AL.

Mathews, J., delivered the opinion of the court.

In this case, the plaintiff claims her freedom under the will of a certain John Marshall, of the state of Georgia.

The answer denies the right of freedom claimed, and alleges that the testator could not, according to the laws of Georgia, manumit his slaves; all owners of this kind of property being prohibited by the statutes of that state, under severe penalties, from executing any act of manumission or in any other manner giving freedom to their slaves, without an act of the legislature authorising such freedom. Judgment was rendered in favor of the plaintiff in the court below, from which the defendant appealed.

In a conflict of laws between two states, where a testator in Georgia, bequeathed to certain of his slaves their freedom, to take effect five years after his death, and before the expiration of the five years, the testamentary executor brings the slaves to Louisiana, and it is shown that at the time of the bequest of freedom the laws of Georgia prohibited the manumission of slaves, except by application to the legislature: Held, that the bequest in the will, being prohibited by the laws of the state where it was made, is null and void.

The only question which the cause presents, arises out of a conflict between the laws of the state where the testator resided before his death, and where his succession was opened by probate of the will, and the bequest of freedom in favor of certain slaves named in said will, amongst which was the plaintiff.

These laws are prohibitory, and had relation to the peace and good order of the community, for the government of which they were enacted. They inhibit absolutely all owners of slaves within the limits of the state, from doing any act giving liberty to their slaves, and prohibit them from granting freedom in any manner whatsoever, except by application to the legislature for that purpose. The law particularly applicable to the present case, was enacted in 1801. The will and its probate bears date in 1809. The fourth clause of this will purports to give freedom to the plaintiff absolutely, after the expiration of five years from the death of the testator. This bequest was made in contravention of a prohibitory law; it was in derogation of a law made in relation to the peace and good order of the community, and was, consequently, absolutely null and void in the state where the law was in force. The plaintiff remained a slave so long as her owner kept her in that state, and certainly could not *ipso facto* become free by being removed to this, wherein slavery is also tolerated.

The bequest of liberty to slaves, which is made in contravention of the law of a state, enacted for the security of the public peace, and good order of the community, is absolutely null and void; and such slaves do not *ipso facto* become free un-

The judgment of the court below, seems to be based on the ground of negligence in the testamentary executors, in not applying to the legislature of Georgia for leave to emancipate the slaves who were freed by the will of John Marshall. This was not a duty imposed on them by express terms of the will, and even if it had been, it is by no means clear that their conduct could in any manner affect the rights which vested in Mrs. Morris, the daughter of the testator, under his will; and by the laws of the state of Georgia, considering the donation of liberty by the testament as absolutely void.

The evidence shows, that the defendant claims title as derived from her. The main question in the case is, in relation to the plaintiff, *libera vel non*. Being from color and actual possession of the defendant, presumed to be a slave, the burden of proving her freedom devolved on her; in which we are of opinion she has failed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court rendered in this case, against both the defendant and his warrantors, be affirmed, reversed and annulled; and it is further ordered, adjudged and decreed, that the defendant be maintained and quieted in his possession of the plaintiff as a slave, and her child, and that she recover the costs of this suit in both courts.

WESTERN DIST.
August, 1834.

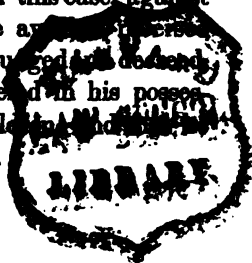
MARY, f. w. c.

vs.

MORRIS ET ALIA.

Under the will, on being brought to this state, where slavery is tolerated, but in which, slaves may be manumitted by will.

In a suit for freedom, when the question is *libera vel non*, and the plaintiff being from her color and the possession of the defendant, presumed to be a slave, the burden of proving freedom, devolves on the plaintiff.



WESTERN DIST.

*August, 1834.***REGILLO ET ALA.****VS.****LORENTE ET ALA.****REGILLO & BRYAN vs. LORENTE ET ALA.**

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Where a suit is brought against A, for illegally retaining possession of a note, and against B, the obligor, included in the same suit, and judgment is asked against the first, to compel a surrender or payment of the note, and the latter also for its amount; the causes of action are different, and judgment may well be taken against the first, while the case is continued as to the latter.

In an action against A for a *tert*, and B on a contract, it is not a joint action, although both parties were brought before the court at once, in the same suit.

The plaintiffs sue as the administrators of the succession of Policarpio Regillo, which was opened in the parish of East Feliciana, on a note of one thousand one hundred and seventy-one dollars, dated 7th January, 1832, and executed by the firm of John Crenan & Co., composed of John Crenan and John Swift; that Swift is the surviving partner of said firm, residing in the parish of West Feliciana, and charged with its liquidation; that Madame Lorente, residing in East Baton Rouge, has possession of said note, and claims it as her own, by an assignment from the deceased payee; they allege, that she has no right or title to the said note, and that it has never been legally assigned to her, but belongs to the succession which they administer. They pray judgment against the defendant Lorente, for the restoration of the note, or its amount; and against Swift, as the surviving obligor in the note, for the sum of one thousand one hundred and seventy-one dollars, with interest thereon, at ten per cent. per annum, from the first of January, 1831, until paid.

Swift appeared and answered, admitting the execution of the note, and that he was willing to pay it, when it was decided to whom he was to make payment; and prayed for general relief, &c.

Madame Lorente failed to appear, and judgment was taken against her by default, and no answer having been put in, final judgment was rendered against her alone, as follows, to wit: "In this case, judgment by default having been entered, and full three days having elapsed, the plaintiff proceeded to the proof of the allegations in the petition, and having established thereby, satisfactory evidence, and the court considering that they are legally entitled to recover, in manner and form, against Madame Lorente, as they have prayed," &c. She was then decreed to deliver up the note in question, to the clerk, within ten days after notification of judgment, for the benefit of the plaintiffs; and in default thereof, to pay the amount thereof and interest. At the trial, the death of Swift one of the defendants, being suggested, Alexander Barrow his executor, was ordered to be made party defendant in his stead, and the cause continued for his answer.

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VS.
LORENTE ET AL.

The counsel for Madame Lorente, came into court after final judgment was rendered, but before signing it, and moved for a new trial, on the following grounds:

1. The final judgment was prematurely taken. 2. The judgment of the court is not supported by the evidence adduced. 3. Judgment could not be rendered against one of the defendants alone, they being sued jointly. 4. Judgment is contrary to law and evidence.

The district judge considered, that there was no law, authorising a motion for a new trial, after a judgment by default had been made final; at any rate it was a motion addressed to the sound discretion of the court. It was overruled, and the defendant Lorente appealed.

Turner, for the plaintiff.

T. G. & M. Morgan, for defendant and appellant, made the following assignment of errors, as appearing on the face of the record.

1. The plaintiffs sued as administrators, and did not give in evidence the letters of administration, or any evidence to show that they were in fact administrators.

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RESILLO ET ALB.
VS.
LORENTE ET ALB.

2. It appears from an inspection of the record, that there was no evidence, showing the property of the administrators in the note sued on.

3. It was not sufficient to show, merely that the defendant was in possession of the note in suit, but they were bound to show title in themselves, before they could recover judgment.

4. The death of Swift had been suggested by the plaintiffs, and no proceeding could be legally had against Madame Lorente, until Swift's executor had been made party to the suit; the action being joint, and not joint and several.

Bullard, J., delivered the opinion of the court.

This case is before us, on assignment of error. The two first assignments relate to matters, which might have been cured by evidence, in the court below, and consequently cannot be examined in this court, without a statement of facts. The third error assigned is, that the death of Swift had been suggested by the plaintiffs, and no proceedings could be had legally against Lorente, until Swift's executor had been made party to the suit, the action being a joint one, and not joint and several.

Where a suit is brought against A, for illegally retaining possession of a note, and against B, the obligor, included in the same suit; and judgment is asked against the first to compel a surrender, or payment of the note, and the latter also for its amount, the causes of action are different, and judgment may well be taken against the first, while the case is continued as to the latter.

In an action against A for a tort, and B on a contract, it is not a joint action, although both parties were brought before the court at once in the same suit.

It does not appear to us the court erred. The action was against Lorente, for illegally retaining possession of the note, and against Swift the obligor. The judgment asked against the first was, that she should surrender the note to the plaintiffs, the latter, that he should pay it to them. The causes of action were different, and judgment in favor of Lorente, would necessarily preclude the recovery against Swift, because it would show that the note belonged to her, and not the plaintiff. The action against the one, was for a tort; against the other, on a contract. It was not therefore a joint action, although both parties were brought before the court at once. The question, which of the two was entitled to possession of the note, might well be contested, without the presence of the obligor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

KEYS ET ALS. vs POWELL AND WIFE.

WESTERN DIST.
August, 1834.APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.KEYS ET ALS.
vs.
POWELL ET ALS.

Where defendants claim title to certain property under an act *sous seing privé*, dated on a particular day in Baton Rouge, and the plaintiffs show, that *on that very day*, in another state, one hundred and seventy miles distant, the same vendor executed a power of attorney before a justice of the peace, *to the same vendee*: Held, that this fact, connected with the circumstance that this person, executing the two acts, had at that time left the state to avoid a criminal prosecution, will be considered such violent presumption of forgery and perjury, as will require the verdict to be set aside, and the cause remanded for a new trial.

The plaintiffs sue as the surviving wife and children, and the forced heirs and legal representatives, of James Sides, deceased. They allege, that in 1819, James Sides purchased a negro woman for one thousand dollars, as community property, who has since had two children, Peggy and Alfred, about ten and twelve years of age, which now belong to them as the surviving wife and children of the deceased; that one Hiram Powell and Charity Keys, his wife, have taken possession of said slaves, and claim them as their own. They pray judgment that the two slaves be restored to them, or their value, alleged to be worth four hundred dollars each; and that there is danger of the defendants running said slaves out of the state: they further pray, that they be sequestered, &c.

Powell and wife pleaded a general denial; they deny that Dorothy Keys, one of the plaintiffs, was the wife of James Sides, deceased; they deny that Susan Shelton and Susan Sides, the other plaintiffs, are heirs of James Sides, deceased; they aver, that Charity Keys, wife of defendant, inherited the negro woman Dinah and her two children, Peggy and Alfred, from her brother, Job Keys, as appears from his will; that Job Keys purchased the said slaves from James Sides in his life-time; that the said Dorothy Keys acknowledged after the said sale that the full price had been paid for said slaves,

WESTERN DIST. and that she was satisfied with the terms of sale ; they then
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 plead the prescription of five and ten years against the
 plaintiff's demand.

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 vs.
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The evidence shows, that James Sides purchased the slave Dinah by public act, passed before the parish judge of East Baton Rouge, dated the 10th August, 1819, for the price of one thousand dollars ; that on the 28th February, 1825, he sold said slave, then about twenty-eight years old, and her two children, Peggy and Alfred, aged four and three years, together with another slave, to Job Keys, for one thousand and two hundred dollars, by act *sous seing privé*, but recorded on the 19th August, 1825, at the request of the vendee. In this act, James Sides, the vendor signed the act of sale by making his mark, in the presence of two witnesses.

In 1827, Job Keys made his will, and bequeathed the slave Dinah and her children, Peggy and Alfred, to his sister Charity Keys, the wife of defendant, Powell.

The defendants produced in evidence, a mortgage on the slaves in contest, executed by Sides in October, 1824, to secure the payment to Job Keys, the sum of eight hundred dollars ; also the answer of Joseph Hickman, a witness to the bill of sale from Sides to Keys, taken to interrogatories, wherein he declares he signed the bill of sale as a witness, and saw James Sides make his mark to his signature thereto. The act of sale purports to have been made in East Baton Rouge, on the day it is signed, to wit, 28th February, 1825.

The plaintiffs offered in evidence a power of attorney, signed by James Sides, in Copiah county, in the state of Mississippi, dated 28th February, 1825, the same day on which the act of sale purports to be executed, constituting the same Job Keys his attorney in fact, to dispose of his property in Louisiana ; also an act of sale of two tracts of land belonging to Sides, to James Mather, dated 17th January, 1826, by said Keys as attorney in fact ; and an act of sale of Mather to Keys of two tracts of land, in April, 1827 ; and also the tableau of distribution of the estate of Job Keys, made in 1827, on which Dinah and her two children, Peggy and Alfred, are put down at seven hundred dollars.

The plaintiff proved by witnesses the marriage of James Sides and Dorothy Keys, and that Susan Shelton and Susan Sides, the other two plaintiffs, are their children.

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VS.
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Hawes, a witness for the plaintiff swears, he had a conversation with Job Keys in the spring of 1827, who said Sides had been in the parish the evening before, and was much distressed for money: "Keys further stated, Sides was coming over to give him a bill of sale, or had already made him a sale of the negroes," &c. The bill of sale produced in evidence, bears date two years before this.

Watts, a witness for defendants, says Job Keys had the negroes in possession a year before his death. He died in 1827. Witness has had the negroes in possession since, as his executor; he delivered them to him.

The jury returned a verdict for the defendants, and judgment was rendered in conformity thereto, from which the plaintiffs appealed.

Elam, for the plaintiffs, relied on the presumption of forgery of defendants' title, arising from the fact of its being executed on the day, which the evidence shows, the vendor was in another state, nearly two hundred miles off.

T. G. & M. Morgan, contra.

Bullard, J., delivered the opinion of the court.

The plaintiffs alleging that they are the widow and heirs of James Sides, deceased, set up title to certain slaves in possession of the defendants, and sue for their recovery. The defendants derive title to them under the last will and testament of Job Keys, who, they allege, purchased them in his life-time, of the ancestor of the plaintiffs. The cause was tried by a jury in the court below, who found a verdict in favor of the defendants, and the plaintiffs appealed.

The sale from Sides to Keys, which was given in evidence, is a private act, under the ordinary mark of the vendor. Its execution is sworn to by one of the subscribing witnesses. It purports to have been executed in the parish of East Baton

Where defendants claim title to certain property under an act *sous seing privé*, dated on a particular day in Baton Rouge, and the plaintiffs show, that on that very day, in another state, 170 miles distant, the same vendor executed a power of attorney, before a justice of

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August, 1834.

KEYS ET AL.
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the peace, to the
same vendee:
Held, that this
fact, connected
with the circum-
stance, that this
person execut-
ing the two acts,
had at that time
left the state to
avoid a criminal
prosecution, will
be considered
such violent pre-
sumption of for-
gery and perju-
ry, as will re-
quire the ver-
dict to be set
aside and the
cause remanded
for a new trial.

Rouge, on the 28th of February, 1825. To rebut this evidence the plaintiff exhibited to the jury, a power of attorney executed by Sides, by which he constituted the same Job Keys his attorney in fact, with power to sell and dispose of any property of the principal, in the parish of East Baton Rouge, bearing the same identical date, and executed and acknowledged before a justice of the peace, in the county of Copiah, in the state of Mississippi, at a distance of one hundred and seventy miles from Baton Rouge. This power of attorney was accepted by Job Keys, who proceeded to act under it, and actually disposed of certain property of the principal. In addition to this, it is shown that Sides had left the State, to avoid a criminal prosecution, had confided his property to Keys, and never returned except on one occasion, and then clandestinely. These circumstances raise such violent presumption of forgery and perjury, the two instruments seem so utterly inconsistent with each other, the one appearing from the evidence before us, to render it impossible that the other can be genuine, that we feel ourselves bound to set aside the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled and reversed, and that the case be remanded for a new trial, and that the defendants and appellees pay the costs of the appeal.

BRADFORD'S HEIRS vs. CLARK.

WESTERN DIST.
August, 1854.

BRADFORD ET AL.

vs.
CLARK.APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
OF THE EIGHTH PRESIDING.

71	147
46	906
71	147
106	58
7	147
116	677

In an action of revendication, for the recovery of a slave, by the heirs, as forming a part of the succession of their ancestor, against the defendant, who holds the slave by written title from said ancestor, executed in his life time, parole evidence is *inadmissible* to prove, that the defendant directed the slave in question, to be inventoried as part of said succession, in order to make out plaintiff's title.

Where parole evidence is offered, with a view to defeat the defendant's written title to a slave, it should be rejected as *inadmissible*.

There is no distinction as to the parties to them, between public and private acts, not recorded in relation to the title to slaves. Between the parties to a contract, an act under private signature, has the same force as a notarial act. They differ as to the mode of proof.

An action of rescission, for lesion beyond moiety, does not lie in relation to the sale of slaves.

Where fraud and simulation, or lesion, are not alleged, a judgment disregarding a written sale of a slave, will be declared erroneous, and be annulled and reversed.

Under the prayer for general relief, when the evidence shows an agreement of the defendant, to pay a certain sum, as the balance of the price of a slave, the court will consider itself authorized to give effect to the agreement, and terminate the controversy between the parties, although not alleged or asked for in the petition.

This is an action of revendication of a slave, alleged to be illegally possessed and claimed by the defendant. The plaintiffs are the heirs and legal representatives of Nathan Bradford, deceased. They allege, that at the death of their ancestor, a negro man slave, named Wilson, belonged to his succession, worth seven hundred dollars; that said slave was directed by defendant, to be put in the inventory of said succession, at the death of Nathan Bradford, in 1825 or 1826; that since then he has taken possession of this slave, and pretends to hold him, in virtue of a bill of sale from the

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CLARK.

deceased, in his life-time, which they allege was made without consideration, and that the slave was never delivered to the defendant, in pursuance thereof; that this bill of sale is an act under private signature, and was never recorded; that since Bradford's death, the defendant entered into a verbal agreement with the widow of the deceased, to take the slave at seven hundred dollars, by being allowed a claim of three hundred dollars against the estate, in payment, and giving the heirs of Bradford, a negro woman slave, worth four hundred dollars; they further allege, that they are the legal owners of said slave, and that the defendant has had him in possession, ever since January, 1825, and that his hire is worth one hundred and fifty dollars per annum. They pray for judgment, decreeing the delivery to them, of said slave, and for the amount of hire at the above rate.

The defendant excepted to the form of action, and averred, that according to the plaintiffs' own showing, it cannot be maintained for the revendication of a slave, &c. On the merits, he pleaded the general issue, and that he held the slave in question, by a just and good title. Finally he interposed the plea of prescription.

James Reams, witness for plaintiffs, declares that he drew the bill of sale from N. Bradford to defendant, of the slave Wilson, which is dated the 9th January, 1816, and expresses the sale to be made "*for the small consideration of seven hundred dollars cash paid, &c.*" Witness says, he acted at that time, as the overseer of defendant, and that the slave Wilson was present at the time of signing the bill of sale, and was delivered; but that the slave was never put under his care, on the plantation, and was shortly afterwards in the possession of Bradford. There was one hundred dollars in cash paid, at the time of making the sale, but he saw no more.

Leonard Bradford, witness for plaintiffs, states that soon after the death of N. Bradford, understanding the defendant had a title to the slave, called on him to know what was to be done; defendant replied and told him, to have the slave put in the inventory; that the slave ran away soon after, and

the following winter (1824 or 5) witness saw him in possession of the defendant; the latter stated to witness, that he had made an agreement with the widow for the slave, that the estate was owing him three hundred dollars, and he was to pay four hundred dollars more, or give her a woman, worth four hundred dollars. Soon after this the widow died, and the children were put under the care of witness, who is the brother of N. Bradford, deceased. Witness called on defendant to assist in the support of the children, out of this four hundred dollars, which he agreed to do, and gave witness one hundred pounds of coffee, and some small drafts of twenty or thirty dollars.

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The slave was not put on the inventory, as it was considered by witness and defendant, that if he was put on the inventory he might be sold, and it would be better for the children, that he should not be sold; that the widow preferred this arrangement, as the boy was difficult to manage, and a woman would be better. Defendant told witness, the reason he did not get the woman for the widow, was that he feared he would not be able to suit her, and that he preferred paying the money; and he never manifested any disposition to pay the four hundred dollars. Witness was curator of the minor children of N. Bradford, and the reason he never called on defendant for further aid, was, that he doubted the title to the slave, being in the defendant.

A bill of exception was taken by defendant's counsel, to the opinion of the court, admitting L. Bradford to be sworn as a witness. 1. That the plaintiffs had alleged a written title from N. Bradford to defendant. 2. That said title had been verified by *Reams*, the first witness called. 3. That plaintiffs' counsel had examined *Reams*, in relation to one part of the deed; that before the parole evidence was taken down, the written title ought to be read to the jury.

A bill of exception by defendant's counsel, was taken, to the decision of the court, permitting L. Bradford to prove a verbal conversation he had with Mr. Clark, in which the latter directed the slave to be put on the inventory, &c., on the ground that parole evidence could not be given to prove

WESTERN DIST. title in a slave ; also to the second examination in chief, of L.
August, 1834. Bradford, on the ground: 1. That this was an action of

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revendication, and no evidence of lesion could be admitted under the pleadings. 2. That the plaintiff had no right to produce evidence of simulation, fraud or contract, as this was neither an action of nullity, or on a contract for any alleged balance, &c. : And finally, to the refusal of the judge to charge the jury. 1. That in an action of revendication, when an outstanding title is opposed, arising from a sale of plaintiffs' ancestor, the sale must first be set aside by an action of nullity, and that under the pleadings in this case, it is not competent to attack it as fraudulent and simulated. 2. That an action to set aside a sale, as fraudulent, as between the original parties or their heirs, is prescribed in one year, from the time the fraud became known to the parties. .

But the judge charged the jury, that there was a distinction between public and private acts, not recorded ; that in the former case of public acts, they must be attacked by the direct action of nullity, for fraud or simulation ; that private acts could be attacked on the ground of fraud in the present form of action.

The claim for hire was discontinued before the verdict. The jury found the slave to be the property of the plaintiffs. Judgment was rendered confirming the verdict ; and after an unsuccessful attempt for a new trial, the defendant appealed.

Bradford, for the plaintiffs.

Ripley, *contra*.

Bullard, J., delivered the opinion of the court.

The plaintiffs allege, that they are the heirs at law, of Nathan Bradford, deceased, who was at the time of his death, the owner of a slave named Wilson, worth seven hundred dollars. They further allege, that after the decease of their ancestor, the said slave came illegally into the possession of the defendant ; that the defendant has a bill of sale for the slave, but that the same was given without consideration, or for less than one-half the value of the slave, and that it is

an act under private signature, and has never been recorded. It is further alleged, that after the death of Bradford, the defendant agreed verbally, to give seven hundred dollars for the slave, by obtaining a credit for three hundred dollars, which he claimed as a debt due him by the estate, and for the balance of four hundred dollars, by conveying to the heirs, a negro woman of that value. They pray judgment for the slave and his services, and for general relief.

The defendant pleaded title in himself, and prescription. The cause was submitted to a jury, whose verdict was in favor of the plaintiffs, and a judgment being rendered thereon, the defendant, after an unsuccessful motion for a new trial, appealed.

The case comes before us, on a statement of facts, and several bills of exception.

One of the bills of exception, upon which the defendant's counsel relies, was taken to the admission of parole evidence, to prove that the defendant directed the slave in question, to be put down on the inventory of the estate of Bradford, as forming a part of the property of the succession. The court allowed the evidence to go to the jury, notwithstanding the objection. We are of opinion that the court erred, and that the evidence was inadmissible. The evidence goes to defeat the title of the defendant, and to vest the property in the estate. Parole evidence of title in slaves, is expressly excluded by the Code, except perhaps in certain cases, of which this is clearly not one.

A second bill of exceptions was taken, to the instruction of the court to the jury. The defendant's counsel asked the court to charge the jury that in an action of revendication, where the defendant sets up a written title, from the ancestor of the plaintiffs, whether under private signature or by authentic act, the sale must be set aside, by direct action of nullity, and that it is not competent under the pleadings in this suit, to attack it as fraudulent or simulated. And that such action between the parties or their heirs, is prescribed by one year. But the court instructed the jury, that there was a distinction

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CLARK.

In an action of revendication for the recovery of a slave, by the heirs, as forming a part of the succession of their ancestor, against the defendant who holds the slave by written title from said ancestor, executed in his life-time, parole evidence is inadmissible to prove that the defendant directed the slave in question to be inventoried as part of said succession, in order to make out plaintiffs' title.

Where parole evidence is offered with a view to defeat the defendant's written title to a slave, it should be rejected as inadmissible.

There is no distinction as to the parties to them, between public and private acts not recorded, in relation to the title to slaves. Between the parties to a contract, an act under private signature has the same force as a notarial act. They differ as to the mode of proof.

An action of rescission for lesion, beyond

WESTERN DIST.
August, 1834.

BRADFORD ET AL.
VS.
CLARK.

moiety, does not lie in relation to the sale of slaves.

Where fraud and simulation or lesion are not alleged, a judgment disregarding a written sale of a slave, will be declared erroneous and be annulled and reversed.

Under the prayer for general relief, when the evidence shows an agreement of the defendant to pay a certain sum as the balance of the price of a slave, the court will consider itself authorised to give effect to the agreement, and terminate the controversy between the parties, although not alleged or asked for in the petition.

between public and private acts not recorded; that in cases of public acts, they must be attacked by the direct action of nullity, for fraud or simulation, but that private acts could be attacked for fraud in the present form of action. We are unable to perceive the force of this distinction, or its application to the case now before the court. Between the parties to a contract, an act under private signature, has the same force as a notarial act; they differ only as to the mode of proof. The petitioners admit the existence of the sale, but allege that it was made without any consideration, or for less than half the value of the property. The deed shows the price to be seven hundred dollars, which the vendor acknowledges, had been paid. The petition does not allege fraud, and an action of rescission for lesion beyond moiety, does not lie in relation to the sale of slaves. *Civil Code*, p. 366, art. 114.

The record furnishes us with no evidence of fraud or simulation, and the judgment, disregarding the written title of the defendant, is in our opinion erroneous.

The subsequent agreement of the defendant, to pay four hundred dollars, as set up by the plaintiffs in their petition, is proved by evidence admitted without objection. This amounts at least to an acknowledgment on his part, that a part of the original purchase money, is still due to the plaintiffs, and which the defendant avowed his willingness to pay. The evidence shows, that about thirty dollars of that balance was paid. Under the prayer for general relief, we think ourselves authorised, to give effect to this agreement, and to terminate the controversy between the parties.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled, avoided and reversed; and proceeding to render such judgment, as in our opinion ought to have been given below, it is further ordered and decreed, that the defendant be quieted in his title to the slave Wilson, and that the plaintiffs recover of the defendant, the sum of three hundred and seventy dollars, with costs in the District Court, the costs of the appeal to be paid by the plaintiffs and appellees.

YARBOROUGH vs. PALMER.

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YARBOROUGH
vs.
PALMER.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Where a party by contract has a right to certain premises, on performance of a condition precedent, and he fails, but enters on the premises in pursuance of his contract, and the adverse party suffers him to remain in possession more than a year, if the latter afterwards enters and takes forcible possession, he will be considered a trespasser, and liable to damages.

Where a person has a right of possession, and suffers his adversary to remain in peaceable possession more than a year, he forfeits his right to a possessory action, and has no remedy left him but the petitory.

The right of possession and actual possession, authorise the possessor to bring an action of trespass, and it is the province of the jury to assess the damages.

The plaintiff alleges he is the owner of a tract or strip of land, between a certain road and a creek, in the parish of East Feliciana, part of which the defendant entered into a written contract to convey to him ; that he was in the peaceable possession of the land for more than a year previous to the 7th February, 1832, when the defendant illegally and forcibly took possession of the premises, pulled down the fences and made others, and still retains his illegal possession ; that he has sustained damages in consequence of the trespass, and being deprived of making his crop, to the amount of five hundred dollars ; for which he prays judgment.

In an amended petition, the plaintiff alleges that the defendant, with the intention of injuring him, pulled down his fences adjoining this piece of land, and left open eighty acres of cleared land, which he was deprived from cultivating, and trespassed on said land by making a road through and over it ; that by reason of the said trespasses, he has sustained one thousand dollars damages, and prays judgment therefor.

The defendant pleads the general issue ; and avers, that prior to April, 1819, he purchased two hundred and fifty-five acres of land, including the disputed premises, from the

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plaintiff, and has been in possession, and the plaintiff is bound to guaranty the title thereof; that the plaintiff owns a tract adjoining this one, through each of which a public road was established, and it was an object with both parties to have it run in a direct and straight line through their land, and that they obtained an order from the police jury to this effect. The road was to be run and opened at the expense of the parties to this suit. That the plaintiff, in order to acquire a corner of the above tract, of about twenty acres, agreed to do all the work, and entered into a written agreement to this effect; and that it was upon this condition he agreed to convey the said corner of land to the plaintiff, that the plaintiff failed to comply with his engagement, in consequence of which defendant entered peaceably and without violence upon this corner of land; he prays that the agreement to convey it to the plaintiff be cancelled, at the costs of the latter, and that he be dismissed with his costs.

Upon these pleadings, the cause was submitted to a jury, upon the evidence produced by the parties respectively. The plaintiff introduced in evidence the papers of another suit in a possessory action for the same premises, between the same parties, in which he had a verdict. Witnesses were called, who proved the pulling down of fences by the defendant, and the trespasses alleged to be committed and complained of by the plaintiff, to a certain extent. The jury found a verdict for the plaintiff of one hundred and fifty dollars in damages, but omitted to decide on the written contract relative to making the road, &c.

The defendant's counsel moved for a new trial, on the ground that the jury did not pass on the whole case, but found damages only, without deciding on the performance or non-performance of the conditions of the contract between the parties, and which were put at issue by the defendant.

It was in proof, that the plaintiff tendered to the defendant one hundred dollars, in full compensation for the land in contest, who refused to receive it, alleging the plaintiff had not made the road according to contract, and on that ground he refused to receive the tender. The motion for a new trial

was overruled. The district judge gave judgment confirming the verdict, from which the defendant appealed.

WESTERN DIST.
August, 1834.

YARBOROUGH
vs.
PALMER.

Saunders, for the plaintiff.

Turner, for the defendant.

Mathews, J., delivered the opinion of the court.

This is an action of trespass, in which the plaintiff claims remuneration for damages, alleged to have been by him sustained in consequence of the defendant having broken the enclosures of the former by removing the fences on his land, &c. The defendant, in his answer, pleads the general issue, and sets up title to the land on which the trespass is alleged to have been committed, &c. The case was submitted to a jury in the court below, who found a verdict for the plaintiff, and judgment being thereon rendered, the defendant appealed.

The evidence of the cause shows, that the parties were separate owners of two tracts of land adjoining a public road, and that it was found convenient to change the direction of this road, which change had the effect of severing a small portion of the defendant's land from his tract, and leaving it in a situation to be more advantageously occupied by the plaintiff. An agreement was entered into between these proprietors, by which it was stipulated that the defendant sold to the plaintiff that portion of land which fell by the course of the new road on the limit of the tract of the latter. The consideration as the price of the property sold, was one hundred dollars, and the labor and expense of making the new road, which the vendee undertook to make at his own separate charge and expense. A principal allegation in the defence is, that this being a condition precedent, and the plaintiff never having complied with his promise and undertaking, he acquired no title to the premises in dispute. The testimony, in relation to the period or length of time during which the plaintiff was in actual possession of the land sold to him on the conditions above stated, shows that he began

Where a party by contract has a right to certain premises, on performance of a condition precedent, and he fails, but enters on the premises, in pursuance of his contract, and the adverse party suffers him to remain in possession more than a year, if the latter afterwards enters and takes forcible possession, he will be considered a trespasser, and liable to damages.

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August, 1831.

COONEY'S HEIRS
vs.
CLARK.

Where a person has a right of possession and suffers his adversary to remain in peaceable possession more than a year, he forfeits his right to a possessory action, and has no remedy left him but the petitory.

The right of possession and actual possession authorise the possessor to bring an action of trespass, and it is the province of the jury to assess the damages.

to use it as his own, and continued thus to possess it more than one year before the defendant entered, committed the trespass complained of, and took the property from the plaintiff.

Under these circumstances, we do not believe the case properly presents any question of title. So far from the appellant having any right forcibly to enter on, and seize the land in dispute, he had, by the lapse of time during which the appellee was suffered to remain in peaceable possession, forfeited his right to a possessory action, and had no remedy left but the petitory. The right of possession acquired by the plaintiff, and actual possession under the contract, authorise the present suit, which is simply an action of trespass. It was the province of the jury to assess his damages, which appear to us not to be excessive.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs; reserving to the defendant his right, if any he have, to sue for a rescission of the contract of sale, &c.

COONEY'S HEIRS vs. CLARK.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
OF THE EIGHTH PRESIDING.

Where heirs claim certain slaves allotted to them in the partition of their ancestor's estate, the *procès verbal* of partition is admissible in evidence, to show title on the part of the claimants.

A partition among heirs of property really belonging to the estate inherited, although not homologated in due time, which is informal and only provisional, gives to each heir a separate, and good and valid title to the property partaken by each, until annulled or changed on the application of those interested in the property of the succession.

Property which belongs to the matrimonial community of acquets and gains, may be seized and sold for the debts of the surviving partner, after the dissolution of the marriage, by the death of one of them, *so far as the interest or one undivided half*, of the survivor is concerned, when no proceedings are had before the levy or seizure to make partition among the heirs.

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August, 1834.
COONEY'S HEIRS
vs.
CLARK.

The plaintiffs are the heirs and legal representatives of John Cooney, deceased. The widow, as tutrix of her two minor children, commenced this action to recover from the defendant two slaves, Lucy and Nelson, who, they allege, belonged to their father in his life-time, as appears by an act of partition between them and their sister Mary M., wife of Vincent Vaughan. The plaintiffs further allege, that the defendant has illegally and unjustly taken possession of said slaves, and refuses to deliver them up. They pray that the defendant be decreed to deliver up said slaves, and twelve dollars per month for their hire, from the 29th of September, 1829, and costs.

The defendant pleaded the general denial; and stated that he purchased said slaves the 16th September, 1829, at sheriff's sale, under execution, issued on a judgment rendered in the suit of John C. Morris *vs.* Mrs. Rowena Cooney, the tutrix of the plaintiffs; that said Morris and said Rowena Cooney are both liable to him in warranty, whom he cites accordingly; and prays that, if judgment be rendered against him, that he have judgment against them *in solido* for the sum of five hundred dollars, which he paid for said slaves, with interest, damages and costs.

Mrs. R. Cooney answers to the call in warranty, and says the execution under which the slaves were seized and sold illegally issued, being ordered by the defendant, Clark, himself, and not the plaintiff in execution; that she never pointed out the slaves seized in said execution, or assented to their seizure, for which reasons the sale was illegal, and that the defendant purchased with full notice of its illegality, and derives no title therefrom. In an amended answer, she alleges the sale under execution of the slaves in question is illegal, for want of notice to the defendant therein, to appoint

WESTERN DIST. an appraiser ; that the property did not sell for a sum sufficient
August, 1834. to satisfy the mortgages existing on it.

COONEY'S HEIRS

**vs.
CLARK.**

Morris pleaded a general denial to the call in warranty ; and in an amended answer avers, he assigned the judgment on which execution issued against said slaves to defendant, Clark, before the issuing thereof.

The evidence shows, that the estate of John Cooney, deceased, was partitioned among his three children, in September, 1828 ; that lots Nos. 1 and 2 fell to the two minors and plaintiffs in this suit, in which were included the slaves Nelson and Lucy ; that the mother, Rowena Cooney, was appointed tutrix to said minors, in October, 1832, after a second marriage. It also appeared, that Mrs. Rowena Cooney had mortgaged these slaves with others, to secure a debt due by her, of five hundred and five dollars, in April, 1827. *Morris* obtained judgment against Mrs. R. Cooney, on an obligation signed by her for two hundred ninety-two dollars and twenty-eight cents, in 1827. The negroes were seized and sold under this judgment, the 16th September, 1829. The evidence further showed, that the estate of John Cooney, deceased, was partitioned among his heirs the 25th September, 1828, and that the two slaves in controversy were allotted to the two heirs, who now are the plaintiffs in the present suit.

The jury returned a verdict for the plaintiffs, for one-third of the value of the two negroes claimed, and four dollars per month hire, from the 16th September, 1829 ; and that Mrs. R. Cooney, as warrantor, is bound to the defendant, Clark, for the purchase money ; and find a verdict in favor of *Morris*, the other warrantor. Judgment was rendered accordingly ; but a remittitur having been entered for two-thirds of the purchase money, so that judgment was only rendered against Mrs. R. Cooney, in favor of Clark, for one hundred and sixty-six dollars sixty-six cents and two-thirds, with interest and costs. The plaintiffs appealed.

Turner, for the plaintiffs.

1. The defendant cannot attack the title of Cooney's heirs, to these slaves, or subject them to the payment of his claim against their mother. He should have brought an action of nullity, to set aside the partition.

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2. The title under which the plaintiffs claim the slaves, was sufficient in law to entitle them to a recovery against the defendant.

3. The possession of the slaves by the defendant, is *tortious*, and they must be surrendered to the legal owners. In such a case, the *tortious* possessor is bound for the full value of the hire of the slaves.

4. The defendant did not acquire any title to the slaves in contest, by the pretended seizure and sale of them to him, on which he relies.

5. The plaintiffs insist, that they are entitled to recover the slaves in contest, and their hire. The judgment of the District Court must be reversed, and judgment rendered in their favor. They rely on the following authorities. *La. Code*, 1219, 1428. 10 *Martin*, 256. 6 *Martin*, N. S. 324. 5 *Ibid.* 361. 7 *Ibid.* 381. 1 *La. Reports*, 282. 2 *Ibid.* 299.

Ripley & Lawson, for defendants.

Mathews, J., delivered the opinion of the court.

This suit is brought to recover two slaves, named Nelson and Lucy, and described in the petition as the property of two of the children of the plaintiff, who represents them as natural tutrix. They claim as heirs to the succession of their deceased father.

The defendant, in his answer, sets up title under a sheriff's deed, which appears to have been made in pursuance of a sale by execution, wherein the property was seized as belonging to the mother, to satisfy a judgment which had been obtained against her by one Morris, &c. The cause was submitted to a jury in the court below, whose verdict, although not clearly intelligible, appears to be the basis of the judgment of that court; from which the plaintiffs appealed.

WESTERN DIST.
August, 1834.

COONEY'S HEIRS
vs.
CLARK.

Where heirs claim certain slaves allotted to them in the partition of their ancestor's estate, the *procès verbal* of partition is admissible in evidence, to show title on the part of the claimants.

A partition among heirs of property really belonging to the estate inherited, although not homologated in due time, which is informal, and only provisional, gives to each heir a separate and good and valid title to the property partaken by each, until annulled or changed on the application of those interested in the property of the succession.

The evidence of the case shows, that the slaves now in contest were, during his life-time, in the possession of the father of the plaintiffs, and were at his death left amongst the property of his succession. It does not appear that an inventory of his estate was ever regularly made, or that any partition of the community of acquets and gains presumed by law, was made at any time after the dissolution of the marriage by the death of the husband. The entire property which was left by the husband, seems to have remained in an undivided state, in the possession of his widow and surviving partner, until the 25th of September, 1828; when a provisional partition took place between the plaintiffs and their sister, who is co-heir; the whole number of heirs of the deceased father being three. In the division which was made of the slaves, assumed to be the property of the succession of John Cooney, the ancestor of the appellants, the two slaves in question fell to their lot; one to each of them. The introduction of the *procès verbal* of partition, was excepted to by the defendant; it was, however, admitted in evidence by the court below, and, we are of opinion, properly; but no effect was allowed to it in the charge of the judge *a quo*; to which an exception was taken by the counsel of the plaintiffs.

It appears to us, that a just decision of the case depends mainly on the effect which ought to be given to this evidence of title on the part of the appellants. It does not purport to be a partition of the whole estate of the deceased, being in appearance confined to certain slaves specified by name, and appraised by experts appointed by the judge of probates of the parish, where the succession was opened, the ancestor having died intestate. The principal objections to it are informalities in the proceedings, and want of homologation in due time. It is true that the proceedings do not appear to be clothed with all the formalities, which probably are required by law to give absolute and conclusive effect to them as a final partition. It was made in judicial form, between co-heirs, some of whom were minors, represented by their mother and tutrix; and if the property really belonged to the estate of their father, the partition thus made gave to each heir a separate

title to the property by him partaken, good and valid until annulled, or changed by application of those interested in the property of the succession. See *La. Code, arts. 1219 and 1438.*

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The principles on which the cause seems to have been decided in the court below, are exhibited in the charge of the judge to the jury. One among them is, that the property in dispute belonged to the matrimonial community of *acquests and gains*, which existed between Mrs. Cooney and her husband, at the time of his death. The presumption of law is as assumed in the charge, and if no proceeding had taken place before the levy of the execution which issued against the property of the surviving partner, her undivided interest presumed to exist, the slaves now sued for might have been legally seized and sold. This presumption, we are of opinion, is outweighed by the partition at which the presumed part owner assisted, and thereby virtually acknowledged the exclusive right to be in the succession of her husband, to the slaves which were divided and partaken as such. Whether these proceedings may be annulled by creditors of the widow, alleging fraud, is a question which we are not called on to determine, in the present suit. According to the pleadings and evidence before us, we are of opinion that the plaintiffs have made out their title, and that the defendant has shown none.

Property which belongs to the matrimonial community of acquests and gains may be seized and sold for the debts of the surviving partner after the dissolution of the marriage by the death of one of them, so far as the interest or one undivided half of the survivor is concerned, when no proceedings are had before the levy or seizure to make partition among the heirs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, and that the plaintiffs and appellants do recover from the defendant and appellee, the slaves Nelson and Lucy, named and described in their petition, and also the sum of one hundred dollars per year, as the value of the services of said slaves, from the institution of this suit until they shall be delivered up to the plaintiffs, &c.: and it is further ordered, adjudged and decreed, that the defendant and appellee do recover from Rowena Cooney, called in warranty, the sum of five hundred dollars, the price by him paid in consequence of the sale by the sheriff, with five per cent. interest thereon yearly until paid. All costs of this suit to be paid by the warrantor, &c.

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August, 1834.

GAYLE'S HEIRS

vs.

WILLIAMS'S AD'N

GAYLE'S HEIRS vs. WILLIAMS'S ADMINISTRATOR.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF EAST
BATON ROUGE.

The neglect or omission to record a judgment within *ten days* after its rendition, under the recording act of March 26, 1813, does not render it a nullity, so as to prevent its having the effect of a legal mortgage, from the date of its registry, when recorded after the lapse of ten days.

Statutes *in pari materia* should be construed together, in order to ascertain the meaning of the legislator.

Prior laws are not repealed by subsequent ones, unless by positive enactment, or clear repugnancy in their respective provisions.

Robert Jones, the administrator of the succession of Doctor William Williams, filed his petition, with a tableau of distribution, of the effects of the succession administered, as an insolvent one: he alleges, that the heirs of said succession are minors, and reside out of the state, and prays that a curator *ad hoc* be appointed to represent them; that Eliza Williams, the widow of the deceased, and residing in the parish, be served with a copy of the petition and citation, and that ten days notice be given, to all whom it may concern, to show cause and make opposition; and in default thereof, that he be allowed to proceed to the payment of the widow and creditors, according to the tableau.

The judge of Probates ordered the appointment of the curator *ad hoc*, and citations and notices, to issue and be served and published.

The administrator set down the net amount of the estate, at two thousand four hundred and seventy-three dollars ninety cents, and allowed the widow in community, one-half thereof, in separate property. The other half, with two sums added, for moneys received on account of sales of husband's property, and a debt due him, amounted to three thousand two hundred and eighty-seven dollars seventy-five cents.

The claims put down as privileged and secured by judicial mortgages are, first heirs of Ann Jones, deceased, for amount

of principal and interest, six thousand four hundred and nineteen dollars fifteen cents, which exhausts the succession by one thousand seven hundred and seventy-four dollars eighty-six cents.

WESTERN DIST.
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GAYLE'S HEIRS
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Next comes a judgment of the heirs of Gayle, for one thousand eight hundred and fifty dollars, after deducting a medical bill, and secured by a judicial mortgage.

The heirs of Gayle made opposition to the tableau, and denied the right of the widow, to take half of the community of acquets and gains, and prayed that her claim be rejected.

They next oppose the claim of the heirs of Mrs. Ann Jones, as privileged. They allege that their claim has the highest privilege, and should be placed first on the tableau, as being supported by a judicial mortgage on all the estate of the deceased: they pray that the tableau be amended, according to the facts set out in their opposition, and that they be placed first, and their claims allowed accordingly.

An agreement was made between the parties, that the contestation of claims, be restricted to that between the heirs of Gayle, and the heirs of Ann Jones, relative to the right of preference.

The heirs of Ann Jones support their claim, by four judgments, obtained against the deceased in his life-time, and recorded on the first of August, 1820. There was another judgment rendered in June, 1821, but was never recorded.

The heirs of Gayle obtained judgment for part of their claim, 30th June, 1823, recorded the 8th July following, for the sum of seven hundred and twenty dollars; the remainder is not shown to be entitled to any privilege.

The probate judge, in rendering judgment, states, "that the heirs of Mrs. Jones, recovered five judgments against the deceased, four of which were recorded on the 1st August, 1820, and will more than exhaust the separate estate of the deceased. It also appears that the heirs of Gayle, on the 30th June, 1823, recovered a judgment against the deceased, for one thousand one hundred and twenty dollars, with interest, which was recorded on the 8th July, 1823. It is contended on the part of Gayle's heirs, that the judgment of the heirs of

WESTERN DIST. mortgages, shall be recorded or entered in a public folio book, kept for that purpose," &c. *Civil Code, p. 464. art. 52. August, 1834.*

GAYLE'S HEIRS

vs.

WILLIAMS'S AD'RS

Statutes in *pari materia* should be construed together, in order to ascertain the meaning of the legislator.

Prior laws are not repealed by subsequent ones, unless by positive enactment or clear repugnancy in their respective provisions.

We believe it to be an incontrovertible principle, that all statutes in *pari materia*, should be construed together, in order to ascertain the meaning of the legislator; and that prior laws are not repealed by subsequent ones, unless by positive enactment, or clear repugnancy in their respective provisions. The old Civil Code required, that judgments should be recorded. The 14th article, page 454, declares in negative terms, that "conventional or judicial mortgages cannot operate against a third person, except from the day of their being entered, in the office of the register of mortgages."

We cannot fairly infer, from these different provisions taken together, that the legislature intended to prohibit, under pain of absolute nullity, the recording of a judgment, after the delay of ten days. It would produce no effect, as a mortgage in relation to persons, who in the interval between its rendition and its record, had acquired any right, which might be affected by it, but as the sole object of registry is declared by the statute to be, to give notice, and to prevent frauds, if we were to pronounce the nullity of the recording, we should carry the statute beyond the declared intention of the legislature. We should make it operate, not for the protection of third persons, having an interest at the time, but as conferring an advantage, on those who were at the time without any interest or right whatever, and who had notice of the existence of the previous judgments.

This court recognised the same principle, substantially, in the case of *Morrison et als. vs. Trudeau*. 1 *Martin, N. S.* 384, in relation to the vendor's privilege. The question in the case of *Jenkins vs. Nelson's syndics*, was between the plaintiff and creditors of an insolvent, in relation to a contract for building, not recorded according to the statute. The point now under consideration, did not present itself; and in the previous case of *Lafon vs. Sadler*, the only question was, whether a written contract was essential to create the builder's privilege. 11 *Martin*, 437. 4 *Martin*, 476.

It is, therefore, ordered, adjudged and decreed, that WESTERN DIST. the judgment of the Court of Probates be affirmed, with August, 1834. costs.

MENARD
vs.
COX.

MENARD vs. COX.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Where the cashier of a bank refuses to pay a check, on the ground that the drawer had no funds in bank, but at the same time advances the money to the *bearer*, it will be presumed the cashier paid his own money as a loan, which will authorise him to recover, in a personal action, in his own name, against the borrower.

When the record furnishes no point, on which the appellant could reasonably hope to obtain a reversal of the judgment on appeal, it will be affirmed with *ten per cent.* damages, and costs.

The plaintiff sues, for the recovery of three hundred dollars from the defendant, on the following draft :

"Cashier of the branch bank of the Bank of Louisiana, pay Sebastian Hiriart or order, three hundred dollars."

"\$300." [Signed] "E. W. Potts."

Endorsed. "I have received the within amount,"
[Signed] "Wm. P. Cox."

The draft is without date ; and the plaintiff alleges, that the defendant presented it to him as the cashier of the bank, about the 20th January, 1830, and represented, that Potts the drawer, was much pressed for money, and bound himself personally, to refund the amount of said draft ; that he refused payment at first, but that the defendant, in addition to the promise of the drawer, acknowledged on the back of the draft, that he had received the money, before he would pay

WESTERN DIST.
August, 1834.

MEWARD
vs.
COX.

the same ; he charges, that it was upon the personal responsibility of the defendant, that he advanced the money, &c. ; he alleges a demand on the defendant, and refusal to pay, and prays judgment for the amount thereof, and interest.

The defendant pleaded a general denial.

Louis Menard, witness for plaintiff, states, that E. W. Potts obtained a loan of one thousand five hundred dollars, from the branch bank of Louisiana, in 1830, which the plaintiff as cashier, paid over to the present defendant W. P. Cox, as the agent of Potts ; that it was paid as follows : in a check for two hundred and sixty-four dollars, and in one of seven hundred dollars, and in another of one hundred and sixteen dollars, and the balance of three hundred dollars, (after deducting one hundred and twenty dollars, the amount of the discount) was paid, without any check, to said Cox ; that the draft sued on, was presented about three weeks after the above sums were paid over, and that the plaintiff told defendant at the time, that E. W. Potts had no money in bank ; witness says, the consideration and inducement for paying the draft, were the representations of defendant, that Potts was in great want of money, and that the former agreed to refund it, as soon as he should examine a memorandum, handed to him by the plaintiff, of the payments of the amount of Potts's loan, which he said was in his pocket-book, at home.

The cause was submitted to a jury, who found a verdict for the plaintiff, for the amount of his claim, with legal interest ; from the judgment rendered thereon, the defendant appealed.

Brunot, for the plaintiff.

Morgan, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff alleges that one Potts, obtained a loan from the bank, of which the former was cashier, for one thousand five hundred dollars, which was paid over to the defendant

Cox, as agent of the borrower, after deducting the discount for one year. That after the defendant had received the whole amount, he presented to him a draft or check, signed by Potts, for three hundred dollars, which the plaintiff refused to pay, as the drawer had no funds. That the said Cox represented to him, that Potts was much in want of that sum, and if he, the plaintiff, would advance it, that he would be personally bound to refund the amount; whereupon the plaintiff alleges he did advance that sum to Cox, on his personal responsibility and promise to refund.

The defendant pleaded the general denial, and the issue between the parties, was tried by a jury, whose verdict was in favor of the plaintiff, and the defendant appealed.

The allegations in the plaintiff's petition, are fully proved by evidence received without exception, in the District Court. The record furnishes no point, on which the defendant could reasonably hope to obtain a reversal of the judgment in this court. It is, however, contended by the counsel for the appellant, that the sum claimed, was paid out of the funds of the bank, of which the plaintiff was cashier, and that it was in fact an overdraft, which the cashier cannot recover, without first showing that he has been rendered responsible to the bank. But there is no evidence that the money was paid out of the funds of the bank; on the contrary, it is shown that the plaintiff refused to pay the draft or check, and advanced the money to the defendant as a loan. We must presume that he advanced his own money, and that the transaction was wholly personal between the parties.

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August, 1884.

BERNARD
vs.
COX.

Where the cashier of a bank refuses to pay a check, on the ground that the drawer had no funds in bank, but at the same time advances the money to the bearer, it will be presumed the cashier paid his own money as a loan, which will authorize him to recover in a personal action in his own name against the borrower.

When the record furnishes no point on which the appellant could reasonably hope to obtain a reversal of the judgment on appeal, it will be affirmed with ten per cent damages and costs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with ten per cent. damages and costs.

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August, 1834.

LOUIS, f. m. c.

vs.

LOUIS, f. m. c. *vs.* CABARRUS ET ALS.
 CABARRUS ET ALS APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
 THEREOF PRESIDING.

Proof of the residence of a slave, in a free state, the constitution of which forbids slavery, during the space of two or three years, unconnected with any other proof, is insufficient in law, to entitle such slave to his freedom.

The residence of a slave, in a state where slavery is forbidden, contrary to the will, or without the consent of the owner, does not deprive the latter of his right to his property.

The consent of the owner of a slave, that he should go and perform work and labor in a free state, does not of itself free the slave, though this may be effected, by the slave's going there under this permission.

The plaintiff claims to be a free man, and institutes this suit against the defendants, who hold him in slavery, to obtain his freedom; he alleges, that he resided in the state of Ohio, two or three years, where slavery is prohibited, and is consequently free: He prays judgment, that he may be entitled to his freedom, and for thirty dollars per month, from the commencement of suit until he shall be set free.

The defendants expressly deny every allegation in the petition, and aver that the plaintiff was born a slave, of a slave mother, and that they purchased him as a slave for life, and paid a valuable consideration for him.

Mrs. Leverett, a witness for plaintiff, swears, that she first saw Louis Richardson, the plaintiff, about twelve or thirteen years ago, in Cincinnati, in the state of Ohio; that she knew him to reside there two or three years.

Mr. Blake, witness for defendants, states, that in 1833 plaintiff told him he was born a slave; but said he was entitled to his freedom; that he had worked in Cincinnati, with his master; that he became free by residing in the state of Ohio, and at the same time, stated he was taken back to Kentucky, where his master resided, and continued to serve him as a slave, until he was brought to Louisiana, and sold to defendants.

The cause was submitted to a jury, on this testimony.

The counsel of the defendant, moved the court to charge the jury, that proof of a residence of two or three years, in the state of Ohio, unconnected with other proof, is not sufficient in law, to establish his freedom, &c., which the court refused, but instructed the jury, that if the plaintiff worked in Ohio, by consent of his former owner, that he did thereby become free, &c.

The jury returned a verdict, "that the plaintiff was a free man." Judgment was rendered in conformity to the verdict, from which the defendants appealed.

Saunders, for the plaintiff.

Turner, contra.

Martin, J., delivered the opinion of the court.

The defendants are appellants from a judgment, which declares the plaintiff entitled to his freedom. It is in proof that he was born a slave, but he claims his freedom by emancipation, resulting from a residence of two or three years in the state of Ohio, the constitution of which, declares that there shall be no slavery or involuntary servitude within that state. The plaintiff obtained the verdict of a jury. There does not appear to be any thing in the record to induce the belief that the jury erred. This court is of opinion the verdict is correct.

But the counsel for the defendants has drawn the attention of the court to a bill of exceptions taken to the refusal of the judge to charge the jury, that proof of the residence of the plaintiff in the state of Ohio, during the space of two or three years, unconnected with any other proof, was insufficient in law, to establish his freedom. And, further, that a person held as a slave, in a slave-holding state, does not become free by residing a short time in a free state, unless his owner resides there as a citizen of that state, and carries along with him such slave; that in this case, unless the jury believed that the former owners actually resided in Ohio as a citizen, having taken the plaintiff with him as his slave, they ought not to find a verdict in favor of the latter, declaring him free.

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LOUIS, f. m. c.

vs.
CARABREUS ET AL.

Proof of the residence of a slave in a free state, the constitution of which forbids slavery, during the space of two or three years, unconnected with any other proof, is insufficient in law to entitle such slave to his freedom.

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LOUIS, f. m. c.
vs.
CABARRUS ET ALIS

The residence of a slave, in a state where slavery is forbidden, contrary to the will or without the consent of his owner, does not deprive the latter of his right to his property.

The consent of the owner of a slave that he should go and perform work and labor in a free state, does not of itself free the slave, though this may be effected by the slave's going there under this permission.

The court charged the jury, that if the plaintiff resided in the state of Ohio, by the consent of his master, he did thereby become a *freeman*; that the consent of the owner, that the slave should go into the state of Ohio and perform labor, was sufficient to entitle him to his freedom.

It appears to this court, that the judge *a quo*, ought to have charged the jury in the manner required in the first part or branch of the request of the defendant's counsel. The residence of a slave in the state of Ohio, contrary to the will, or without the knowledge of his master or owner, does not deprive the latter of the right to his property.

The latter part of the judge's charge to the jury, is too loosely expressed, and indefinitely stated, to justify a finding thereon.

The consent of the master, that the slave should go and perform work and labor in Ohio, does not, of itself, free the slave, though this may be effected by the slave's going there under this permission.

All parties have a right to a trial by jury, aided by any *legal* opinion of the court which they may request, and uninfluenced by any improper charge of the judge.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; the verdict set aside, and the cause remanded with directions to the judge *a quo*, to charge the jury that proof of a slave's having resided in the state of Ohio, or any free state during the period of two or three years, unconnected with any other proof, does not authorise or entitle him to his freedom; and to abstain from charging or stating to the jury, that the permission given by the master to his slave, to go and labor in the state of Ohio, had the effect to emancipate him. The costs of the appellate court to be paid by the plaintiff and appellee.

HEIRS OF KIMBALL vs. HEIRS OF LOPEZ.

WESTERN DIST.
August, 1834.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
OF THE EIGHTH PRESIDING. KIMBALL'S HEIRS
vs.
LOPEZ'S HEIRS.

When the record does not furnish a certificate, either by the judge or clerk, that it contains all the evidence on which the cause was tried, nor a statement of facts, the cause cannot be examined on its merits, but the court will decide on the questions of law, presented by the bills of exception in the record.

A sheriff cannot be called as witness, to prove what proceedings took place, at a certain sale made by him, when the return made on the execution is silent, or stated that the execution had been stayed, by order of the District Court.

Parole evidence is inadmissible, to supply defects in the sheriff's return of proceedings under an execution, or where it contradicts the official return of the officer.

The plaintiffs sue as the heirs and legal representatives of Esther McD. Kimball, to recover a slave named Peter, worth eight hundred dollars, who they allege, is illegally in the possession of the defendant's ancestor. This suit was filed the 13th May, 1826, and on the 20th, in pursuance of the prayer of the petition, the negro was sequestered. The plaintiffs set up title to the slave in contest.

The defendant pleaded a general denial, and excepted to answering the petition, because a copy in the French language was not served on him; on the merits, he says he purchased the slave in question, of one John Sands, in 1815, by an act under private signature, which is annexed; and that Sands purchased him at sheriff's sale, the 11th of July, 1814, as appears by the deputy sheriff's bill of sale, of that date: He pleads the prescription of ten years, and calls John Sands, his vendor, in warranty, and in the event of eviction, he prays judgment against his warrantor, for the value of the slave, and costs.

Sands answered to the call in warranty. He states he purchased the slave Peter, at sheriff's sale, for the parish of

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East Baton Rouge, when a boy of about thirteen years of age ; that Lopez proposed to take him, for the price at which he was bid off, and be substituted to him as the purchaser, to which he consented, and the defendant took possession, and has continued to possess said slave ever since ; that shortly after the inception of this suit, he was induced, at the instance of Mr. Lopez, to sign an act of sale of Peter to him, and that the latter stated at the time, he had no intention or wish to render him liable, in consequence of signing it, but wanted it, and had it dated back to the 25th February, 1825, to enable him to resist this suit ; that since this transaction Lopez has died, but his heirs and representatives are well acquainted with the facts, and this effort by them to call him in warranty, is illegal and fraudulent ; that the plaintiffs have no right to recover, as the slave was legally sold, and purchased in good faith, by this respondent, in the manner he has alleged.

The testimony shows, that Esther McD. Kimball was the wife of Wm. Williams, that in 1809 she and her brother Benjamin Kimball, signed an obligation to pay one David B. Stewart, four hundred and thirty-six dollars ; that after the death of Williams, his wife married John Cammack. In 1814, judgment was obtained on the above obligation, against the estate of B. Kimball and Esther McD. Cammack, after her second marriage. The negro Peter, then a boy, was given up to Cammack and wife, sold under execution to satisfy the judgment of Stewart, and purchased by John Sands, the warrantor.

Kelly, a witness for plaintiff, states that he knows the negro Peter, and that he was born the property of William Williams, the first husband of Esther McD. Kimball, the mother of plaintiffs. His mother's name was Sucky, and was derived from the estate of Frederick Kimball, as part of William Williams's wife's estate, which she inherited from her father.

Dorothy Wells knew the slave Peter, from his birth until 1812. He was the property of Mrs. Williams, the mother of plaintiffs. She received his mother from her father's estate.

The defendant offered in evidence, the sheriff's deed of the sale of Peter, to John Sands, which was objected to by the plaintiffs' counsel, on the ground, that it did not appear to be returned and recorded in the clerk's office, and because the judgment and execution, in virtue of which the sale was made, had not been previously shown by him; the court admitted the document in evidence as sufficient, upon which to found the plea of prescription. The plaintiffs' counsel took his bill of exceptions to the opinion of the court.

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LOPEZ'S HEIRS.

The defendant, after the other evidence had been produced, and the testimony gone through on both sides, offered the record of the judgment and execution of Stewart *vs.* Kimball et als., under which the slave in contest was sold, which was objected and excepted to by the plaintiffs' counsel, as coming too late, but was admitted.

The district judge considered the plaintiffs failed to make out their case, and gave judgment for the defendants, from which, after an unsuccessful motion for a new trial, the plaintiffs appealed.

Turner, for the plaintiffs.

R. & A. N. Ogden, for the defendants.

Bullard, J., delivered the opinion of the court.

The plaintiffs sue to recover a slave, which they claim as the property of their ancestors, in the possession of the defendants. The defendants plead title derived from one Sands, who was cited in warranty, and whose title exhibited is a sheriff's deed, and the defendants further rely on prescription.

The transcript of the record does not furnish us a certificate either by the judge or the clerk, that it contains all the evidence on which the cause was tried in the court below, nor a statement of facts. We cannot, therefore, examine the case on its merits, but confine our attention to the questions of law, presented on the bill of exceptions in the record.

In the progress of the trial, it appears that T. C. Stannard, was examined as a witness to prove, what proceedings took

When the record does not furnish a certificate either by the judge or clerk, that it contains all the evidence on which the cause was tried, nor a statement of facts, the case cannot be examined on its merits; but the court will decide on the questions of law presented by the bills of exception in the record.
A sheriff cannot be called as

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witness to prove what proceedings took place at a certain sale made by him, when the return made on the execution is silent, or stated that the execution had been stayed by order of the District Court.

Parole evidence is inadmissible to supply defects in the sheriff's return of proceedings under an execution, or where it contradicts the official return of the officer.

place in execution of a *fiery facias*, by virtue of which the slave in question was sold. He had acted as deputy sheriff, and the return on the execution was silent as to the sale, and indeed, stated that the execution had been stayed by order of the District Court. His testimony was objected to, and a bill of exceptions taken to its admission by the court. The court was clearly in error. The testimony went directly to contradict the official returns of the officer, and to supply a defect in the proceedings which can only be done by record evidence. Parole evidence is, in our opinion inadmissible to supply so important a link in the chain of titles, as the adjudication of the property by the sheriff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, that the case be remanded for a new trial, with directions to the district judge, not to admit parole evidence to contradict the return of the sheriff, nor to prove the adjudication of the property, and that the defendants pay the costs of the appeal.

POND vs. HORTON.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the record is not filed in the Supreme Court, on the return day thereof, and no application is made to the court for leave to file it after that day, the appeal will be dismissed on motion.

In this case, the appeal was granted on the 27th November, 1833, returnable to the Supreme Court, at Baton Rouge, the first Monday in August, 1834. The first Monday was the third day of the month, and the appeal

record was not filed, until the ninth day of the month. **WESTERN DIST.**
 The appeal was taken by the defendant and appellant. **August, 1834.**

**POND
 vs.
 BORTON.**

Andrews, for the plaintiff and appellee, moved to dismiss the appeal on the following grounds :

1. That the record was not filed on the return day thereof.

2. The transcript of the record, was filed with the clerk after the return day, without leave of the court, or showing cause why it was not sent up in time.

3. It appears from the sheriff's return, that a copy of a copy of the petition of appeal, was served on the appellee.

4. And should this motion be overruled, the appellee denies that there is error to the injury of the appellant ; and further says, that the appeal is frivolous, and taken for delay ; wherefore he prays the affirmance of the judgment below, with ten per cent. damages, and costs.

Sanders, contra.

Mathews, J., delivered the opinion of the court.

In this case the appellee moves to dismiss the appeal, on the grounds, that the transcript of the record of proceedings was not filed in the Supreme Court, on the day of the return of the appeal, as required by the 587th article of the Code of Practice and that no application was made to the court, for leave to file it after that day, as prescribed by law.

These we believe to be good grounds, in support of the motion to dismiss.

Where the record is not filed in the Supreme Court, on the return day thereof, and no application is made to the court for leave to file it after that day, the appeal will be dismissed on motion.

It is, therefore, ordered, that the appeal in this case be dismissed.

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LOPEZ ET AL. vs. BERGEL.

LOPEZ ET AL.
vs.

BERGEL.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

When the defendant suffers judgment by default, to be taken against him, it is a presumption, that by his silence, he acknowledges the justice of the plaintiff's demand.

Where the defendant does not deny the plaintiff's debt, but lets judgment go by default, this fact will be considered as a corroborating circumstance, which taken with the testimony of one witness, is sufficient proof of the demand, to make such judgment final.

The omission of the defendant, to deny the plaintiffs' capacity to sue, waives the right to do so, and dispenses him from the necessity of proving it, even when the demand is denied. The same consequence should follow, when there is a legal presumption of its justice being confessed.

The defendant's acknowledgment, and promise to pay his note, before and after the lapse of five years from the time it became due, and before suit is brought, will take the case out of prescription, when the action would otherwise be barred.

This is an action on a promissory note, executed by Gregorio Bergel, to the ancestor of the plaintiff, the 22d August, 1825, for five hundred and thirteen dollars, payable one year after date, with interest, at the rate of ten per cent. per annum, from the time it became due, until paid. The suit was filed December 21st, 1833, and citation served the third day thereafter.

The plaintiff's sue, as the widow and heirs of the obligee of the note, and pray judgment for the amount thereof, with interest.

Judgment by default was rendered against the defendant, on the 7th January, 1834, and made final, after producing satisfactory proof of the demand, on the 17th of the same month, and signed on the 19th February following, without any appearance of the defendant.

The plaintiffs called a single witness to *prove their demand*, who testified, that he presented the note repeatedly to the defendant for payment, who always promised to pay it; that the first time he presented it, was in 1828, and at other times, every year thereafter.

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HERREL.

On the 13th June, 1834, the defendant obtained an order of appeal, to this term of the court (August, 1834).

Lawrence & Winthrop for the defendant and appellant, urged the following points, in support of the case on the appeal:

1. There is no proof, that the plaintiffs possess the character in which they sue. They sue as the heirs and legal representatives of Lopez, which they specially set out and allege, and it is not seen why they should not be held to as strict proof of it, as if the defendant had denied it specially.

2. The Code of Practice requires, that to be entitled to a judgment by default, the plaintiff must prove his demand, which is required in *all cases*. *Code of Practice*, 312.

3. The execution of the note is not legally proved, according to the phraseology of the article of the Code of Practice referred to. When the law prescribes a particular mode of judicially investigating a fact, the judge is not at liberty to adopt a different course, and if he does, the fact will not be considered as proved. *Code of Practice*, 325.

4. The acknowledgment of the note, and promise to pay it, are not sufficiently proved. They should have been, either in writing, or have been evidenced by the testimony of one witness at least, with corroborating circumstances.

5. A contract for the payment of a sum exceeding five hundred dollars, must be proved by the testimony of *one credible witness, and other corroborating circumstances*. *Pothier* admits, that a verbal promise to pay, when the debt exceeds one hundred livres, is inadmissible, according to the ordinance of 1667, which requires such a promise to be in writing. *Pothier on Obligations*, No. 659. *La. Code*, 2257. 8 *Martin*, N. S. 457. 3 *La. Reports*, 213. 5 *Ibid.* 286. 6 *Ibid.* 525.

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6. The claim was barred by the prescription of *five* years, *which is now pleaded.*

7. The acknowledgment, and promise to pay, not being proved, as shown in the preceding points, there is no evidence to repel the plea of prescription.

R. & A. N. Ogden, for the appellees.

1. The plea of prescription cannot prevail. It was not pleaded regularly and at the proper time, and the court cannot now consider it. *La. Code*, 3486, 3516.

2. The plaintiffs were not bound, to prove the capacity in which they sued, as it was not denied. The rule is well established, that where a party sues in a representative capacity, *he is not* required to prove that he possesses that capacity, unless it is *specially denied*.

3. The law declares, that a judgment by default, is a tacit joinder of issue and a tacit confession by the defendant, of the justice of the plaintiff's demand; the reason is therefore much stronger, *is not* requiring proof of the representative capacity of the plaintiff, in this case, than when there is a general denial. *Code of Practice*, 360.

4. The objection, that the execution of the note was not proved, in pursuance of the article 325, of the Code of Practice, has no force. That article relates to a case, when the defendant has denied his signature.

5. There is no law, requiring the acknowledgment of the maker of the note to pay it, to be made in writing, or proved by the testimony of two witnesses, or of one with corroborating circumstances.

6. In this case the acknowledgment by the defendant, that he executed, and would pay the note, was made before the prescription was complete, and is different from that made after the debt had been extinguished by prescription, in which case it would only be evidence of a new contract.

Martin, J., delivered the opinion of the court.

The defendant who is sued on a promissory note, suffered judgment by default to be taken, and on its being made final he appealed.

He now claims the reversal of the judgment, on the ground that the debt was proved by one witness only, without any corroborating circumstances; that the plaintiffs, who sue as the representatives of the original obligee and payee of the note, have not proved their representative capacity; and finally, he relies on the plea of prescription filed in this court.

The pretensions of the defendant are resisted on the ground, that he had not denied the debt, and that this fact was a corroborating circumstance of sufficient weight, to authorise the judgment by default to be made final on the testimony of a single witness. That the capacity of the plaintiffs had no need to be proven, as it was not sufficiently denied; and that, although the suit was brought more than five years after the note became due, prescription cannot be opposed as a bar to a recovery, because there is evidence of repeated acknowledgments and promises to pay. These promises to pay, it is urged, are sufficiently proved by the testimony of one witness, because the possession of the note by the plaintiffs is a corroborating circumstance, as it raises a strong presumption of its being unpaid.

The Code of Practice, article 360, provides, that when the defendant suffers judgment by default to be taken against him, it is a presumption of his having, by his silence, acknowledged the justice of the plaintiffs demand. It is true, that in the same article, the legislator interprets this silence as evidence of the defendant having *joined issue* with the plaintiff, i. e. denied his allegations. This discrepancy does not, however, prevent the declaration, that by suffering judgment to be taken by default, from raising the presumption of an acknowledgment of the demand. This declaration, the legislature had the power to make. They have made it. It is not the duty or business of this court, to deprive it of its effect, and to avoid considering what the legislature has pronounced to be a presumption of the acknowledgment of the justice of a demand, as a legal corroborating circumstance, which strengthens the proof of it by one witness; especially when we reflect, that under the former Code, the mere suffering

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When the defendant suffers judgment by default to be taken against him, it is a presumption, that by his silence he acknowledges the justice of the plaintiffs' demand.

Where the defendant does not deny the plaintiffs' debt, but lets judgment go by default, this fact will be considered as a corroborating circumstance, which taken with the testimony of one witness is sufficient proof of the demand to make such judgment final.

The omission of the defendant to deny the plaintiffs' capacity to sue, waives the right to do so, and dispenses him from the necessity of proving it, even when the demand is denied. The same consequence should follow when there is a legal

WESTERN DIST. judgment to be taken by default, was, in a case like the
August, 1834. present, complete proof of the debt.

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presumption of
 its justice being
 confessed.

The defend-
 ant's acknow-
 ledgment and
 promise to pay
 his note before
 and after the
 lapse of five
 years from the
 time it became
 due, and before
 suit is brought,
 will take the
 case out of pre-
 scription, when
 the action would
 otherwise be
 barred.

If the omission of the defendant to deny the plaintiff's capacity to sue, waives the right to do so, and dispenses him from the necessity of proving it when the debt is denied; the same consequence ought to follow, when there is a legal presumption of its justice being confessed.

The possession of the note by the plaintiffs, afford some presumption that it is still unpaid. The forbearance to sue, may well be imputed to the repeated promises of the defendant, and is a corroborating circumstance of the evidence on record, that the promises were made. The cause may well be presumed from the effect.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

SPOTTS VS. LANGE AND LONGUEPE.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
 OF THE SECOND PRESIDING.

Where two purchasers join in the purchase of a boat, its load and cargo, and one acts as the agent of the other; when sued jointly for the price, the one who authorised the other to act as his agent, cannot call his co-defendant in warranty.

Purchasers of property, from a person having the *apparent* right of disposing of it, are not to be considered as trespassers.

An amendment, correcting an error in the petition, by describing certain timbers in a house-frame, to be *poplar* instead of *walnut*, as originally stated, does not require an answer.

The plaintiff alleges, that in the month of October, 1832, he entrusted one Samuel Barber, in Henderson county, in the state of Kentucky, with the captaincy and agency of a flat-

boat and her load, consisting of plank, scantling and house-frames, to bring to New-Orleans; that in December, when the boat and load arrived at Baton Rouge, Hilaire Longuepe and Charles Lange, fraudulently and without any right or title, took possession of her, and converted to their own use, the said boat and her loading, worth the sum of one thousand four hundred dollars, for which he prays judgment, or the restoration of the boat and cargo, and for six hundred dollars in damages and costs.

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LANGE ET AL.

The defendants separated in their answers. Lange pleaded the general issue; specially denying all fraud, or that he is bound either personally or *in solido*, with said Longuepe, for the restitution of said boat, lumber, and house-frame, or the payment of any sum of money therefor. He further states, he purchased from Hilaire Longuepe, one-half of said boat and lumber, and part of a house-frame, different from that described in the petition, for which he paid six hundred dollars; that Longuepe showed him a receipt, by which it appeared, he had paid eight hundred dollars for the boat and its cargo, from which he appeared to be the rightful owner. He prays judgment in warranty, against Longuepe, for the same amount that may be obtained against him, in case it is made to appear, that the said boat and its contents, were the property of the plaintiff, &c.; and for three hundred dollars in damages.

The plaintiff had leave to amend his petition, by alleging, that the *house-sills* stated therein to be of walnut, were in fact made of *poplar*.

Longuepe pleaded a general denial; and that he purchased the boat and lumber, as the agent of Charles Lange, his co-defendant, from a person, purporting to be the commander of the boat, whom he believed to be the *bona fide* owner; but that he never took possession of any part of the property, which was taken by his co-defendant. He prays for a separate trial.

Certain interrogatories were propounded by the plaintiff, in a supplemental petition, to be answered by the defendants in open court, at a time to be fixed. Longuepe, one of the defendants, moved to have them struck out, on the ground,

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that he had severed from his co-defendant in his trial; that his defence is adverse to that of his co-defendant, &c. The motion was overruled, and a bill of exceptions taken.

Lange answered the interrogatories, and declared that he bought the half of the flat-boat and lumber, &c., from *Longuepe*, his co-defendant, who showed a receipt, by which it appeared he gave eight hundred dollars, for the boat and her loading. After taking out part of the contents of the boat, he gave *Longuepe* six hundred dollars for the balance. He denied that *Longuepe* acted as his agent.

Longuepe, in answer to the interrogatories, stated that he purchased the boat and contents, as the agent of *Lange*, for two hundred dollars. That the person from whom he bought, after stating his reasons, and on giving a bill of sale, stated in it, that the price was eight hundred dollars, &c.

Mr. Jones, a witness for plaintiff, states that he assisted in procuring the lumber and house-frame in question, and that he has since seen the same house-frame, and about fourteen or fifteen thousand feet of the boards and scantling, in the lumber-yard of *Lange*; as a carpenter, the witness estimates the house-frame, and what plank, scantling and materials he has seen in possession of the defendant, as worth seven or eight hundred dollars, not including the fourteen or fifteen thousand feet of lumber, &c., which is worth about three hundred dollars.

The cause, on this evidence, with that of several witnesses, substantially corroborating it, was submitted to a jury, who returned a verdict of one thousand one hundred dollars for the plaintiff, against *Lange*, and in favor of *Longuepe*, upon which judgment was rendered. The defendant's counsel moved for a new trial, on several grounds, which was overruled, and *Lange* appealed.

R. & A. N. Ogden, for the plaintiff.

1. The verdict, and judgment thereon, is fully supported by the law, and the evidence of the case. Whether *Lange* knew at the time or not, that he was purchasing the property

of another, he was bound to return it, or its value, to the real owner, when he appeared and claimed it. *Story on Bailment*, page 70 and 79. 2 *Kent's Com.* 262. *Bacon's Abridgment* tit. *Merchandise*. 4 *Martin, N. S.* 288. 3 *La. Reports*, 282.

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2. The evidence showing that Lange had taken all the property, and converted it to his own use, he is certainly liable for the value of it; the plaintiff having in his petition, demanded a judgment against each defendant, for the whole amount.

Turner, for the appellant. The defendant Lange seeks a reversal of the judgment against him, on the following grounds:

He assigns as error, apparent on the face of the record, that there was not a *contestatio litis*, to the amended petition. 4 *La. Reports*, 13.

2. The verdict does not respond to the plaintiff's demand, or to the issue between the parties, that being in the alternative for the property or its price; the verdict is therefore, contradictory, inconsistent and illegal.

3. If at all liable, Lange was only jointly bound with his co-defendant. He had sold the house-frame, and is only bound for the price he received for it.

4. But Lange was the true owner of the property; he had purchased it fairly, and for a valuable consideration, without notice of the plaintiff's title, and in due course of trade. 8 *Martin, N. S.* 368.

5. He committed no fraud or trespass, was not liable for damages, and is at all events, entitled to be re-imburshed for the money he paid for the property: He therefore insists on a reversal of the judgment, and one rendered in his favor, or that the cause be remanded.

Martin, J., delivered the opinion of the court.

This action is brought to recover from the defendants, in *solido*, a flat-boat and its loading, or a sum of one thousand four hundred dollars as its alleged value.

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The defendant pleaded the general issue, and averred he had purchased from his co-defendant, one undivided half of a flat-boat, with a quantity of lumber and timber, and particularly part of a house frame, and that the latter had appropriated to his own use, such part of the timber and lumber as he wanted, and for the remainder, which came into his (Lange's) possession, he paid six hundred dollars to his co-defendant, whom he called in warranty.

Longuepe (the other defendant) pleaded the general issue, and specially denied having taken possession of the boat or its loading. He admitted, that as agent of his co-defendant, he had purchased a quantity of lumber and timber on board of a flat-boat, from a person who called himself (and whom he believed to be) the real owner. He averred that his co-defendant took possession of the lumber and timber.

The plaintiff, with leave, amended his petition, by stating that the sill of the house-frame, was of poplar, and not of walnut, as had been erroneously stated. To this amendment, neither of the defendants filed an answer.

The plaintiff next filed a supplemental petition, praying that the defendants might answer several interrogatories annexed thereto.

Longuepe objected that a motion he had made for a separate trial was still pending, and Lange's answer must be taken in his own favor, on the demand in warranty. That the interrogatories did not correspond to the allegations in the petition, and they were not filed until after the defendants had answered the petition. Ten days at least should have been allowed them to answer in.

The defendants were ruled to answer the interrogatories, on the following day, and the defendant Longuepe excepted.

Lange, in answering, averred the truth of his statements in his answer to the petition, denied that his co-defendant was his agent in the purchase, and averred that he did not know any thing but the payment of six hundred dollars.

Longuepe answered he was his co-defendant's agent in the purchase, and was especially authorised by him for that purpose. That two hundred dollars only, were paid to the

ostensible owner, for the boat and loading, which sum was paid by him, in the presence of the boat's crew. That his co-defendant desired the price to be stated at five hundred dollars, but the vendor put it down at eight hundred dollars.

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The bill of sale was in the following words: "Baton Rouge, Dec. 4, 1832. This will certify that I have sold a flat-boat loaded with lumber to Hilaire Longuepe, for the sum of \$800, with all the articles thereto belonging."

The subscribing witness testified, that Lange was not present at the signing of the bill of sale.

The vendor testified, that, as the agent of the plaintiff, he had delivered the lumber and timber claimed in the petition to Barber, in Kentucky. He identified a large portion of it, which he, being a carpenter, estimated at one thousand one hundred dollars.

Monget testified he heard Lange tell his co-defendant to purchase the boat and loading for them, and to pay the two hundred dollars.

Roulston, a hand on board, deposed that the boat was first, commanded by Barber, but afterwards by Jones the vendor.

There was a verdict against Lange for one thousand one hundred dollars, and for his co-defendant.

Judgment was given accordingly, and Lange appealed, after an unsuccessful effort to obtain a new trial.

Our attention has been given to a bill of exceptions taken to the charge of the judge to the jury, in which he instructed them to disregard the appellant's claim on the warranty, expressing his opinion that co-trespassers were not entitled to an action of warranty, which is confined to real property; adding, that no order to cite in warranty had been given or prayed for in the petition, or judgment by default had been taken.

Where two purchasers join in the purchase of a boat, its load and cargo, and one acts as the agent of the other; when sued jointly for the price, the one who authorised the other to act as his agent, cannot call his co-defendant in warranty.

It does not appear to us the judge erred, although we are not able to see the applicability to the present case, of that part which relates to co-trespassers, as the purchase having been made from a person having the apparent right of disposing of the property (purchased) the vendees ought not to be considered as trespassers.

Purchasers of property, from a person having the apparent right of disposing of it, are not to be considered as trespassers.

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REYNOLDS ET AL.

vs.

YARBOROUGH.

An amendment correcting an error in the petition, by describing certain timbers in a house-frame, to be *poplar* instead of *walnut*, as originally stated, does not require an answer.

The amendment stating the sills of the house frame, to be not of walnut, but of poplar timber, appears to us a mere correction of an error in the petition, which did not render an answer necessary.

On the merits, nothing appears to authorise our interference with the verdict. It does not appear to us proper to notice the exceptions of Languepe, on his being ruled to answer interrogatories as he did not appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.



REYNOLDS, BYRNE & CO. vs. YARBOROUGH.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE OF THE EIGHTH PRESIDING.

Where parties enter into an obligation, containing a penalty of seven thousand dollars, for the faithful payment of a sum not exceeding five thousand dollars, at a particular time, on failure of the principal to comply, the surety will only be bound for the principal sum stipulated to be paid, and not the penalty.

The penal clause in the obligation, is the compensation for the damages the creditor sustains, by the *non-execution* of the principal obligation.

But damages due for the *delay* in the performance of an obligation to pay money, are called interest.

Conventional interest, whether stipulated in *eo nomine*, or in the shape of a penalty, cannot exceed *ten per cent*.

In an action to recover damages, for the non-performance of a contract, proof of putting the party *in mora*, by a special demand, must be made.

In an action to recover the principal sum, and to enforce the performance of the primary obligation in a contract, the commencement of suit, puts the defendant in default, in relation to damages.

The plaintiffs institute suit on an obligation, signed by one John Bostwick, as principal, and Stephen Yarborough, as surety, in which they acknowledge themselves indebted to the plaintiffs, in the sum of seven thousand dollars, conditioned for the faithful payment of five thousand dollars, or such sum, not exceeding that amount, as the defendant Bostwick may be indebted to the plaintiffs, at the end of twelve months, in consequence of endorsements or advances made, and credits given to him, in the course of business.

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The plaintiffs allege, that at the end of twelve months, there was a balance due to them from Bostwick, of five thousand six hundred and eighty-six dollars eighty-five cents, according to an annexed account; that this sum has been amicably demanded of Bostwick, and of Yarborough, who have neglected and refused to pay it, by reason of which they are liable on their said bond, and bound to pay the sum of seven thousand dollars, for which they pray judgment *in solido* against the principal and surety; or for the sum of five thousand six hundred and eighty-six dollars and eighty-five cents, the amount due on said account.

The defendants pleaded a general denial; and the defendant Yarborough denied that he had been notified, of the failure of Bostwick to perform the conditions of the obligation sued on, or that he had any knowledge of such failure or refusal, until after commencement of suit.

The district judge, considering the account as proved on the trial, rendered judgment on the minutes, for nearly the sum claimed in the account, amounting to five thousand six hundred and twenty dollars sixty-three cents, with interest, against both defendants.

The counsel for the defendants moved for a new trial, on the following grounds:

1. Because the case was illegally and improperly set for trial.
2. The court erred in rejecting the application for a trial by jury.
3. The judgment is contrary to law and evidence.

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The court ordered the motion for a new trial to be overruled ; and the judgment to be so amended, as to stand against Yarbrough for five thousand dollars, with interest and costs. From this judgment, so far as it relates to Yarbrough, the plaintiffs appealed.

In his answer to the appeal, Yarbrough alleges error, on the ground that he was not put in default, and consequently, no legal judgment could be rendered against him, and for which he prays a reversal.

Turner, for the plaintiffs, contended that the defendant could not have the judgment reversed, because he did not appeal from it ; and also on the ground of having lost the opportunity of doing so, by not filing his answer to the appeal, in the time prescribed by law.

3. The appellee is required to file his answer, on the return day of the appeal, or within three days thereafter, which he failed to do. *Code of Practice*, 591, 896.

3. The judgment must be reversed, because the obligation of the defendant, binds him for the full amount of the penalty of seven thousand dollars, and for any amount under that sum, which the plaintiffs in pursuance of their agreement, had advanced, disbursed, or became in any way liable for, to Bostwick. This sum is proved to be five thousand six hundred and ninety-five dollars seventy-four cents, exclusive of one hundred and forty-four dollars and fifty cents, commissions, &c.

4. The District Court had no right to change the judgment against the plaintiffs, and in favor of the defendants, after it had once been rendered. *Code of Practice*, 517, 518.

5. The defendant is not entitled to notice on this principle. A person not a party to a bill, cannot complain of the want of notice, unless he can show that it has done him a prejudice, *Bailey on Bills*, 185, note 114. *Chitty on Bills*, 204.

Saunders, for the defendant.

Bullard, J., delivered the opinion of the court.

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The plaintiffs sue on a bond signed by John Bostwick as principal, and the present appellee, Yarborough as security, by which they engage to pay the plaintiffs seven thousand dollars. In the condition of the bond, it is recited that, "whereas the said Reynolds, Byrne & Co., have agreed to furnish and advance sums of money to the said John Bostwick, and to endorse notes for him, and to accept his bills, &c., not exceeding five thousand dollars, provided that the said Bostwick would obtain the said Stephen Yarborough to consent and agree to become his security, jointly and severally with him, binding themselves to secure and save harmless, the said Reynolds, Byrne & Co., against any balance, that at the end of twelve months may be due to them, to the extent of five thousand dollars." The parties then agree, that if at the expiration of the year, there should be no balance due, or if Bostwick shall pay any such balance or release the plaintiffs from their liabilities, then the obligation to be void ; else to remain in full force and virtue.

The plaintiffs allege, that at the expiration of the year, there was a balance due them by Bostwick of five thousand six hundred eighty-six dollars and eighty-five cents, and they pray a judgment *in solido*, either for the penal sum of seven thousand dollars, or the aforesaid balance in the alternative.

Judgment was rendered against Bostwick for the whole balance due, with interest and costs. The parties appear to suppose, that the judgment below was only for five thousand dollars against the security ; but on examining the record, it appears that although, after rendering the judgment against both for the whole amount, the judge, before signing it, directed it to be amended, so as to restrain the liability of the security to five thousand dollars ; yet probably by a clerical mistake the judgment was ultimately signed, and so appears before this court, against both parties *in solido*, for the whole balance, with interest at ten per cent. and costs.

The plaintiffs appealed from so much of the judgment as relates to the defendant Yarborough, and insist before this

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Where parties enter into an obligation containing a penalty of seven thousand dollars, for the faithful payment of a sum not exceeding five thousand dollars at a particular time, on failure of the principal to comply, the surety will only be bound for the principal sum stipulated to be paid, and not the penalty.

The penal clause in the obligation, is the compensation for the damages the creditor sustains by the non-execution of the principal obligation.

But damages due for the delay in the performance of an obligation to pay money, are called interest.

Conventional interest whether stipulated in *eo nomine* or in the shape of a penalty, cannot exceed ten per cent.

court, that the defendant is bound for the seven thousand dollars, or any less sum, which the plaintiffs had advanced under the agreement.

The appellee answers, that there is no error to the prejudice of the appellant, but he prays that the judgment may be reversed, principally on the ground, that he had not been put legally in delay, before the inception of the suit.

The first question, therefore, is, whether the liability of the security was limited to the sum of five thousand dollars by the contract. It seems to us clear, that the plaintiffs did not obligate themselves to advance more than that sum, and that the security did not engage to guarantee the principal for more. Indeed it is formally declared, that he "engages to secure and save harmless the said Reynolds, Byrne & Co., against any balance that at the expiration of the year, may be due to them *to the extent of five thousand dollars.*" But it is contended, that the plaintiffs are entitled to recover the whole seven thousand dollars. This appears to us to be an obligation with a penal clause. The primary obligation of the security was to pay the balance which might be due, not exceeding five thousand dollars, and the penalty was the sum of seven thousand dollars. *La. Code, art. 2113.*

"The penal clause is the compensation for the damages which the creditor sustains by the non-execution of the principal obligation." *La. Code, art. 2121.*

"The damages due for delay in the performance of an obligation to pay money, are called interest." *La. Code, art. 1929.*

It is further provided by the Code, that conventional interest cannot exceed ten per cent. When the parties are silent as to the interest or damages for the non-payment of money, the law fixes it at five per cent. in contracts with individuals, and in those with banks, at the rate established by their charters. But conventional interest, whether stipulated in *eo nomine* or in the shape of a penalty, cannot exceed ten per cent.

This brings us to examine the defence set up by the appellee, that the plaintiffs are not entitled to recover any

thing in this suit, because he had not been put legally in default.

In an action to recover damages for the non-performance of a contract, proof of a putting of the party *in morâ*, by a special demand, was holden by this court, in the case of *Erwin vs. Fenwick*, to be a prerequisite to the recovery of any damages. 6 *Martin, N. S.* 229.

The obligor may be put in default in three different ways: 1st. By the terms of the contract, when it is specially agreed, that the party failing to comply, shall be deemed to be in default, by the mere act of his failure. 2d. By the act of the party; and, 3d. By the operation of law.

Among the acts of the party, by which the obligor may be put in default, is a demand made by the commencement of a suit; that is, as we understand it, a suit to enforce the principal obligation, and not one merely for damages for its non-performance. If then, this suit is instituted to recover the principal sum, to enforce the performance of the primary obligation of the contract, or in lieu thereof to recover the stipulated penalty, the commencement of the suit itself, puts the defendant in default, in relation to damages.

According to these principles, if the judgment had been signed as it was directed to be amended, it would have been fully sustained by the law, and the evidence; but as this judgment comes before us in such a form, as we think it ought not to stand, it must be reversed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, as relates to the defendant Yarborough, be reversed, and proceeding to render such judgment as ought, in our opinion, to have been given below, it is further adjudged and decreed, that the plaintiffs recover of the said defendant Yarborough, *in solido*, with his co-defendant, the sum of five thousand dollars, with costs of the District Court, and that the costs of the appeal be borne by the appellants.

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In an action to recover damages for the non-performance of a contract, proof of putting the party *in morâ* by a special demand, must be made.

In an action to recover the principal sum, and to enforce the performance of the primary obligation in a contract, the commencement of suit, puts the defendant in default in relation to damages.

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vs.

O'CONNER.

DAVID FLOWER vs. RACHEL O'CONNER.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

On the death of a partner leaving *several* surviving ones, neither has the right of suing *alone as surviving partner*, nor has one the right to sue as surviving partner, for the *use of them both*, when there are two surviving.

In all commercial partnerships, the surviving partner, in order to receive the portion of the deceased partner, and hold it subject to the payment of the partnership debts, must make application to the Court of Probates, have such portion ascertained and valued, and give bond with security.

A surviving partner does not possess the right, until he is authorized by the Court of Probates, to sue for, or receive partnership debts.

Pleas or exceptions that are not declinatory, need not be pleaded *in limine litis*.

This suit was instituted by David Flower, *as surviving partner* of the late commercial firm of D. B. Finley & Co., in New-Orleans, to recover from the defendant as the heir of her deceased son, Stephen Bell, the sum of six thousand three hundred and thirty-six dollars eighty-six cents. The suit is brought by D. Flower, *as the surviving partner, &c., for the use of W. & D. Flower*, on a promissory note executed by the firm of Bell & Finley, in favor of D. B. Finley & Co., payable the tenth of March, 1821, for four thousand nine hundred and forty-four dollars eighty-nine cents, and on the balance of an account current in favor of D. B. Finley, and due by said firm of Bell & Finley, for one thousand three hundred eighty-six dollars and ninety-seven cents. The plaintiff alleges that Finley is dead, and his estate is insolvent; and that Bell has since died, and the defendant has accepted his succession with the benefit of inventory, and thereby rendered herself liable to pay the debts thereof. He prays judgment against the defendant for the aggregate sum of six thousand three hundred and thirty-six dollars eighty-six cents, interest and costs.

In an amended and supplemental petition, the plaintiff alleges that the defendant took possession of her son's estate (S. Bell) without the intervention of justice ; has never made an inventory thereof, and by her intermeddling in the affairs of said estate, she has become personally liable for the debts thereof.

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The defendant pleaded the pendency of another suit, instituted against her by the present plaintiff, for the same subject matter, and upon the same allegations, to which she pleaded in substance, that she had accepted the succession of Stephen Bell, with benefit of inventory, which plea was sustained, and the District Court decided it had not jurisdiction of the case, which judgment, then rendered between the same parties, is now pleaded, as *res judicata* ; wherefore she prays to be dismissed.

The defendant further answering and excepting says, she was a married woman when she accepted the succession of her son, that she never interfered with his succession, nor received any portion of it ; that she was under this disability, and could not be liable for its administration, or any acts in relation to it, which disability she pleads, &c.

She further denies that the plaintiff is the surviving partner, or was the partner, of the firm of D. B. Finley & Co., or that any such firm existed ; or that the plaintiff is entitled to sue as surviving partner ; but should have caused himself to have been appointed and authorised as the legal representative of said firm as required by law, and not having done so, this suit must be dismissed.

Upon these pleadings, the parties went to trial. The defendant obtained a verdict and a new trial was ordered, and an appeal taken, on which the case was remanded for a new trial. See 8 *Martin, N. S.* 592.

On the return of the case, a second trial was had, which resulted in a verdict and judgment for the plaintiff. The defendant appealed.

Ripley for the plaintiff.

Turner for defendant, assigned errors, as follows :

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1. It is apparent upon the face of the record, that there is a total want of right, in the plaintiff, David Flower, to recover in the form and manner in which he has sued. He sues as surviving partner of the firm of D. B. Finley & Co., to the use of himself and another, viz: William Flower; and it appears in the record, that he was not the surviving partner of the firm of D. B. Finley & Co., consequently could not appropriate the debt sued for, to himself, or to any one else.

2. The plea that a surviving partner, could not as such, maintain an action, was a good and sufficient plea, and should have been sustained by the District Court, and it was improperly overruled. *La. Code*, 1131, 1132. 3 *La. Reports*, 357.

3. The motion to amend, by pleading that this suit had been withdrawn, by submitting it to judicial arbitrators, was improperly overruled. *Code of Practice*, 335, 336. *La. Code*, 3066, 3069.

4. This cause was improperly tried, upon the merits, when there was no issue upon the merits, nor judgment by default. 4 *La. Reports*, 13.

5. The verdict and judgment is not sustained by the evidence. There was no proof of the plaintiff's demand.

6. The payments admitted by the plaintiff, if the cause was properly tried upon the merits, should have been imputed, by the jury, to the liquidated demand. *La. Code*, 2162.

Martin, J., delivered the opinion of the court.

In this case the defendant and appellant has assigned as errors on the face of the record, the following:

1. That there was a total incapacity or want of right in the plaintiff to sue in the manner and form in which he has done, because he was not the surviving partner of the firm of D. B. Finley & Co., which was composed of four members, two of whom were living at the institution of the suit.

2. That at the time the suit was instituted, a living partner could not exercise the rights of a deceased one, without

having been authorised to do so by the Court of Probates, and giving bond as required by law. WESTERN DIST.
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The counsel for the plaintiff and appellee has replied, that the surviving partners D. & W. Flower, are parties to the present suit, which is brought by D. Flower, for the use of W. & D. Flower. That the want of authority from the Court of Probates, ought to have been presented as exceptions *in limine litis*, which would have afforded to the plaintiffs the opportunity of showing they had obtained such authority, and given bond accordingly.

It is very clear that on the death of one partner, leaving several surviving ones, neither has the right of suing alone, as surviving partner, and we are not prepared to say that when a suit is brought by A, for the use of B, the latter is necessarily a party to the suit, so as to be concluded by the judgment.

The second error assigned is certainly fatal. The Code in all commercial partnerships, gives to the surviving partner, after the portion of the deceased partner, in the partnership effects, has been ascertained and estimated, the right to require that this portion should remain with his own, in order that the whole may be applied to the discharge of the partnership debts, if necessary. *La. Code, art. 1131*. The next succeeding article requires him to give bond for that purpose. Accordingly this court held in the case of *Crozier vs. Hodge*, 3 *La. Reports*. 357, that a surviving partner does not possess the right, until he is authorised by the Court of Probates, to sue for, or receive partnership debts.

There was no necessity of pleading this matter *in limine litis*. This was not a declinatory exception. *Code of Practice, arts. 335, 336*. Indeed the application of the partner, the ascertainment and valuation of the portion of the deceased partner, the requisition of the Court of Probates, and the giving bond, were conditions precedent, without which, the right of mixing this portion with those of the other partners did not vest.

It is clear the District Court erred, in disregarding the plea of the defendant in this respect.

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On the death of a partner leaving several surviving ones, neither has the right of suing alone as surviving partner; nor has one the right to sue as surviving partner for the use of them both, when there are two surviving.

In all commercial partnerships the surviving partner, in order to receive the portion of the deceased partner and hold it subject to the payment of the partnership debts, must make application to the Court of Probates, have such portion ascertained and valued, and give bond with security.

A surviving partner does not possess the right, until he is authorised by the Court of Probates, to sue for or receive partnership debts.

Plea or exceptions that are not declinatory, need not be pleaded *in limine litis*.

WESTERN DIST. It is, therefore, ordered, adjudged and decreed, that the
August, 1834. judgment of the District Court be annulled, avoided and
FLOWER ET ALA. reversed, and that there be judgment for the defendant as
vs. in case of a non-suit, with costs in both courts.
O'CONNOR.

W. & D. FLOWER vs. O'CONNOR.

**APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
 THEREOF PRESIDING.**

Where parties agree to submit the matters in controversy between them, in a suit pending, to judicial arbitrators, it by no means follows, that the suit is to be dismissed without the consent of the plaintiff, on the motion or exception of the other party.

A plea of usury is not considered a peremptory exception, going to extinguish the action, and will not be received pending the trial, after the jury is sworn,

The plaintiff may compel the production of accounts or documents, furnished by him, in the course of business, and which are in the hands of the opposite party, although they might not be legal evidence in the cause, when produced, but are open to every legal objection.

The possession of accounts rendered to the defendant, when called for, may be evidence against him, that such accounts were rendered, *i. e.* to prove *rem ipsam*. On refusal to produce them, the plaintiff has a right to give his affidavit in evidence to the jury, describing their contents, and calling for the documents.

When an application is made for the production of documents, in the possession of the opposite party, unaccompanied by affidavit, and duplicates of them are already in court, the order to produce them, will be refused.

The affidavit of the party is insufficient to establish the loss of a note, but it is admissible in evidence, as the basis of other proof, either positive or circumstantial.

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In the cross-examination of plaintiff's witness, the defendant cannot require him to detail declarations of the defendant, made out of the presence of the plaintiff, and which make evidence against him.

On cross-examination, plaintiff's witness becomes that of defendant, and the latter cannot make his declarations, made out of the presence of the other party, evidence in his own favor.

An attorney at law, who receives, or is to receive a per centage on the amount of money he recovers, or a stipulated fee, is a competent witness to testify in his client's cause, and is not thereby disqualified, on the score of interest, when that interest consists in his *honorarium*.

Attorneys at law are not inhibited from stipulating for a commission, or per centage on collections to be made by them, and such bargains do not render them incompetent to testify.

An error in calculating the highest rate of interest, by which it exceeds the legal amount one hundred dollars or so, will not be considered as charging usurious interest.

Usury may be shown, and taken advantage of, even when it is not pleaded, if it appears from the petition, or evidence offered by the plaintiff, that more than ten per cent. was stipulated.

The estate of the son, dying without issue, leaving only his mother to inherit, becomes her paraphernal property, and she has a right to administer it, without the interference of her husband.

The acceptance of the succession of her son, by the mother, with the consent of her husband, and the benefit of inventory was an engagement, as relates to creditors, that if she did not administer the estate according to law, as beneficiary heir, she would be personally liable for the debts.

Where a mass of facts, relating to the settlement of a succession and the accounts of a mercantile firm, and where fraud and circumvention is charged, are all submitted to a jury, who appear to have carefully allowed the debits and credits between the parties, their verdict will not be disturbed.

This is an action, instituted by W. & D. Flower, against the defendant, as heir at law of her deceased son, Stephen Bell, whose succession it is alleged, she has accepted, with

WESTERN DIST. benefit of inventory ; and to charge her with the balance of a
August, 1834. mercantile account against the deceased, amounting to ten
FLOWER ET ALB. thousand six hundred and sixty-eight dollars, which the
vs. plaintiffs allege she is liable to pay, and for which they pray
O'CONNER. judgment, with ten per cent. interest thereon, from the 10th
December, 1820, at which time she is charged with having
given a written promise to do so.

The defendant pleaded, as *res judicata* to the plaintiffs' demand, the fact of another suit having been instituted against her, by the same plaintiffs, for the same claim, in October, 1826, to which she pleaded in substance, that she was heir under the benefit of inventory, to the said Stephen Bell, which plea was sustained, and the court decided it had no jurisdiction of the case, and that judgment stands as *res judicata* in the present case.

In an amended petition, the plaintiffs charge the defendant with assuming the quality of universal heir, of intermeddling and taking possession of her son's succession, without the authority of justice, by which she became personally liable for his debts, &c.

The defendant replied, that she accepted her son's estate, with benefit of inventory ; that at the time of his death, she was a married woman, and never interfered with, or received any portion of his estate ; being married, she avers she is not liable for his debts, and expressly pleads her disability, and that she is not responsible, if no inventory was taken thereof.

She then pleads a general denial ; admits her signature to the account sued on, but that it is not binding, having been made without the authorisation of her husband.

In a supplemental answer, she reiterates the averment, that her signature to, and approval of the account of plaintiffs', against the succession of her son, is not binding, because she was surprised into it by the plaintiffs, and it was done without the authority and consent of her husband, and without value or consideration ; that she acted in relation to her son's estate, for the benefit of the creditors, and applied it to the discharge of his debts, and that the plaintiffs have received

more than their proportion, according to the amount of their claims against it. WESTERN DIST.
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A trial was had on this state of the pleadings, and appeal taken from the judgment then rendered, to the Supreme Court. See 8 *Martin*, N. S. 555. FLOWER ET AL.
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On the return of the case, at May term, 1831, the defendant's counsel moved to dismiss the suit, on the ground, that the parties had mutually submitted the cause to judicial arbitrators; the motion was overruled, and a bill of exceptions taken.

On the final trial, the defendant's counsel moved the court to grant an order on plaintiffs, for the production of the originals of two documents, copies of which were exhibited, marked Y, showing the amount of merchandise, sold by an auctioneer in New-Orleans, by order of plaintiffs, but who had rendered the accounts of sale to Bell; copies of these accounts were annexed to the motion, which was overruled.

The defendant's counsel next moved the court, for leave to file the plea of usury, which was overruled, as the trial had commenced, and the jury were sworn; the opinion of the court was excepted to.

The plaintiffs made an affidavit, of the contents of a certain account current, rendered by them to Bell, in May, 1819, in which they state, they had credited the proceeds of twenty-two bales of cotton to him; and which account they allege, together with several other notes and accounts, specified in the affidavit, are in possession of the defendant's counsel; they obtained an order for their production, in open court, on the next day. On the next morning, the counsel for the defendant moved to rescind this order, on the following grounds:

1. That the documents called for, are not legal evidence in plaintiffs' favor.

2. They are extracts from the books of the plaintiffs, which are not of themselves, legal evidence, consequently extracts from them are less so. 4 *Martin*, N. S. 383.

3. Extracts from merchants' books, are not admissible in evidence. 4 *Martin*, N. S. 483.

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The motion of the counsel was overruled, and the accounts and notes required to be produced. A bill of exceptions was taken. Several other bills of exception were taken, to the decision of the court, on points arising in the progress of the trial. They are all noticed in the opinion of this court.

The parties then went into an examination of the accounts between the plaintiffs and the late Stephen Bell, embracing a variety of commercial transactions and intricate accounts, and after hearing many witnesses on both sides, as to the state of the accounts on both sides, the jury returned a verdict for the plaintiffs of five thousand seven hundred and thirty-six dollars and fifty-three cents.

The defendant's counsel moved the court for a new trial, on the following grounds, viz :

1. The court erred in refusing the plea of usury, by which a large sum of usurious interest was allowed.

2. The court erred, ruling against the defendant, in the several points mentioned in the bills of exception.

3. The verdict is contrary to law and evidence, &c.

The motion was overruled. Judgment was rendered against the defendant, as heir of her deceased son, S. Bell, for the amount found in the verdict, from which she appealed.

Ripley & Haraldson, for the plaintiffs.

Turner, for the defendant.

1. The District Court improperly refused the defendant the privilege, of showing that this case had been, by consent of parties, referred to judicial arbitrators, for decision.

2. The defendant should have been permitted, to avail himself of the plea of usury, at the time when he offered it.

3. The court improperly overruled the motion, to rescind the order in favor of the plaintiffs, for the production of certain accounts and documents, alleged to have been rendered by the plaintiffs to the late Stephen Bell, in his life-time.

4. The court erred, in depriving the defendant of legal proof, by refusing the motion for an order upon the plaintiffs

to produce two documents, being accounts of sales of goods, made at public auction, under the direction of plaintiffs, for account of Stephen Bell.

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5. The contract sued on, was executed in error, being an error of fact, in relation to the substance of it; which is therefore illegal and void.

6. The contract is shown to be usurious, and the defendant has a right to take advantage of its illegality, as an error, apparent on the face of the record, in order to have the usury decided on, in this court. 4 *Martin*, N. S. 542.

7. The finding of the jury, is evidently for a much larger sum, than was due, if in fact any thing was due.

8. The plaintiffs should be required to give credit, and be answerable for the amount of the notes and accounts assigned to them, which they have not done.

9. It is apparent on the face of the record, that the judgment is erroneous, in not pursuing the verdict. The jury found interest from the 18th of February, 1825, and the judgment gives interest from the 11th of February, 1825.

10. The instrument sued on, is not binding on the defendant. She was a married woman at the time of its execution, which was done without the authorisation of her husband. It further appears, from the very terms of the act, she did not intend to render herself personally responsible. She is not responsible as heir to her son, not having accepted his succession; nor has she done any act which would make her responsible for the debts of her son.

Bullard, J., delivered the opinion of the court.

The plaintiffs sue to recover of the defendant, the amount of a debt due by one S. Bell, in his life-time, alleging that the defendant is his heir at law, and has rendered herself liable as such unconditionally. It appears by the record, that soon after the death of Bell, the defendant went before the parish judge, and with the consent of her husband, declared that she accepted the succession with the benefit of inventory. Some months after this she signed an account rendered by the defendants against the succession, showing a balance due

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them of about thirteen thousand dollars, approving the same, and authorising its payment with interest at ten per cent.

On a former trial in the District Court, this instrument was regarded as a nullity, it having been signed without the consent of the husband, and the court also refused to receive as evidence the petition of the defendant, authorised by her husband, to be admitted as beneficiary heir of her deceased son. On appeal to this court, it was decided that the court erred in rejecting the evidence, and instructing the jury, that her acknowledgment of the account was void, and that the evidence ought to be admitted, leaving its effect to be judged of by the jury. See 8 *Martin*, N. S. 555.

On the second trial, the jury gave a verdict in favor of the plaintiffs for a large balance, which they found due, with interest, which, after an unsuccessful attempt on the part of the defendant to obtain a new trial, was followed by a judgment of the court; from which the defendant appealed.

The case comes before us on very numerous bills of exception, assignments of error and points filed by counsel, and a full statement of facts.

Where parties agree to submit the matters in controversy between them in a suit pending, to judicial arbitrators, it by no means follows that the suit is to be dismissed without the consent of the plaintiff, on the motion or exception of the other party.

A plea of usury is not considered a peremptory exception going to extinguish the action, and will not be received pending the trial after the jury is sworn.

1. The first bill of inception, to which our attention is drawn, was taken to the refusal of the court to dismiss the suit, at the instance of the defendant on her exception, that all matters in controversy, had been submitted to judicial arbitrators, and that the court could no longer take cognizance of the cause. It appears that the court refused to receive the plea, on the ground that it was not a peremptory exception, and that it had previously been decided on motion, at the last term. We are of opinion, that the judge did not err; although parties may agree to submit to arbitrators, matters in controversy in a suit pending, it by no means follows, that the suit is to be dismissed, without the consent of the plaintiff, on the motion or exception of the other party. In this case, it did not appear that such was the agreement.

2. The next bill of exceptions is to the refusal of the court to allow a plea of usury to be filed pending the trial. It was refused on the ground that it was not a peremptory exception, and that peremptory exceptions mentioned in the Code of

Practice, are such only as go to the extinguishment of the whole action. In our opinion, the court was correct in refusing to receive the plea, after the jury was sworn.

3. During the progress of the trial, the court on an affidavit of the plaintiffs, ordered the production of certain accounts rendered by them to Stephen Bell, in his life-time, and which they alleged, were in the hands of the defendant's attorney. On the following day the attorney moved the court to rescind that order, on the grounds, 1st. That the documents called for, could not make legal proof in favor of the plaintiffs. 2d. That they were extracts from the books of the plaintiffs, and that if the books could not be admitted, much less could extracts be good evidence in their favor; and, 3d. That extracts from merchants' books, are not admissible. The court overruled the motion, on the ground that when the documents were produced, they would then be subject to objections to their admissibility. A bill of exceptions was taken. The contents of the accounts rendered, might not have been evidence in favor of the plaintiffs, but the possession of them by the party, may have been evidence against her, that such accounts were rendered; that is, to prove *rem ipsam*. Whether admissible or not for any purpose, the order was properly given, and the party had always the right to object to their being read to the jury. If inadmissible, it is difficult to conceive what harm their production could have produced, and why they were not produced. On the neglect or refusal to produce the documents, the plaintiffs had a right to give their affidavit in evidence to the jury, as evidence in the cause. We think the court did not err.

4. In the progress of the trial, the defendant's counsel moved for an order on the plaintiffs to produce the two documents marked Y, annexed to the written motion. This was refused by the court, and the bill of exceptions taken. It is true, the judge did not give the best reason for refusing; his reason was that the transaction between the parties, being a mercantile one, the call should have been for all the books and papers of the plaintiffs, and that the defendant could not single out a particular paper, isolated from the rest. On referring to

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The plaintiff may compel the production of accounts or documents, furnished by him in the course of business, and which are in the hands of the opposite party, although they might not be legal evidence in the cause, when produced, but are open to every legal objection.

The possession of accounts rendered to the defendant, when called for may be evidence against him that such accounts were rendered, i.e. to prove *rem ipsam*. On refusal to produce them, the plaintiff has a right to give his affidavit in evidence to the jury, describing their contents, and calling for the documents.

When an application is made for the production of documents in the possession of the opposite party, unaccompanied by affidavit, and duplicates of them are already in court, the order to produce them will be refused.

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documents Y, we find that they are accounts of auction sales, made for account of W. & D. Flower, rendered by Le Carpentier. As the application was not accompanied by an affidavit, as required by the Code, we are at a loss to know for what purpose the defendant sought the production of papers, of which duplicates were already in court. The refusal of the court to order their production, did not preclude the defendant from offering any evidence, which would tend to show the connexion of those accounts of sales with the present controversy; none is shown by the pleadings, and although we are not prepared to go the whole length with the judge *a quo*, yet, as there were some legal reasons, why the order should not be given, and no possible injury could result to the party from the refusal, we think the judge acted correctly in declining to give the order.

The affidavit of the party is insufficient to establish the loss of a note, but it is admissible in evidence as the basis of other proof, either positive or circumstantial.

5. The next bill of exceptions relied on, was taken to the ruling of the District Court, in admitting the affidavit of one of the plaintiffs, in relation to the loss of a note, which it is stated, was assigned, together with other notes and accounts, to the plaintiffs as collateral security, and which, when paid, were to be credited to the defendant. The reading of the affidavit was objected to on the ground, that the plaintiffs could not make evidence for themselves. According to the article 2258 of the Louisiana Code, the loss of a paper cannot be proved by the affidavit of the party alone. The loss must be shown, either by direct testimony, or by such circumstances *supported by the oath of the party*, as render the loss probable. The oath or affidavit of the party is, therefore, admissible as the basis of other proof, either positive or circumstantial. We think the court correctly admitted it.

In the cross-examination of plaintiff's witness, the defendant cannot require him to detail declarations of the defendant made out of the presence of the plaintiff, and which make evidence against him.

6. In the further progress of the trial, a witness introduced by the plaintiffs, being on his cross-examination, went on to detail certain declarations made by S. Bell in 1819, to him, relative to a draft, which he said he had received, and which would enable him to pay for the goods he had purchased. The plaintiffs' counsel moved the court to strike out all that part of his testimony, given as the declaration of Bell, on the ground that his declarations made out of the presence of the

plaintiffs, ought not to be given in evidence to the jury. The court ordered the evidence to be stricken out, and the defendant took a bill of exceptions. On the cross-examination, the witness became the witness of the defendant, and the defendant being herself the heir of Bell, she could not make his declarations out of the presence of the other party, evidence in her favor, any more than she could her own. We think the evidence was very properly rejected.

7. The last bill of exceptions relied on, was taken by the defendant to the refusal of the court to order the testimony of Mr. Haraldson, of counsel for the plaintiffs, to be stricken out on the ground of interest. On his cross-examination, he stated that "he was so far interested in the suit as to receive a certain per centage on the amount recovered, to wit: five per cent., but since the institution of the suit, he had received an amount of money in compensation and otherwise, which he deemed a sufficient compensation for his services." In addition to this declaration, he tendered a release. The court declined to order the testimony to be stricken out. By article 2262 of the Code, an attorney or counsellor at law, is forbidden, without the consent of his client, to disclose any thing which has been confided to him by such client; but his being employed, does not disqualify him from being a witness in the cause. The same Code gives attorneys and counsellors an action against their clients, to recover their fees. It was not, we think, the intention of the legislature to exclude attorneys at law, on the ground of interest, when that interest consisted in their *honorarium*. It is true they are forbidden to stipulate for a part of the thing in controversy, and in one sense of the word, a per centage is a part of the thing, when that thing is money. But the court is of opinion, that they are not inhibited from stipulating for a certain commission on collections to be made by them, and that such a bargain does not render them incompetent to testify. Independently, therefore, of the release, we consider Mr. Haraldson a competent witness, and that the court did not err, in overruling the motion.

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On cross-examination, plaintiff's witness becomes that of defendant, and the latter cannot make his declarations made out of the presence of the other party, evidence in his own favor.

An attorney at law who receives or is to receive, a per centage on the amount of money he recovers, or a stipulated fee, is a competent witness to testify in his client's cause, and is not thereby disqualified, on the score of interest, when that interest consists in his *honorarium*.

Attorneys at law are not inhibited from stipulating for a commission, or per centage on collections to be made by them, and such bargains do not render them incompetent to testify.

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In addition to these bills of exception, the defendant assigns for errors apparent, on the face of the record, 1st. That the contract sued on, is usurious. 2d. That the charge of the court delivered in writing, and contained in the record, is illegal and improper, and 3d. That the judgment differs materially from the verdict rendered.

As to usury, it appears in the record, that the amount found due on settlement, was to bear interest at ten per cent., and it fully appears both by admissions and proof, that in calculating that amount, there was an error of one hundred dollars, which was corrected. This does not appear to us an attempt to obtain a higher rate of interest than the law permits. On the contrary, we should infer the intention of the parties to agree on ten per cent., on whatever amount was really due, as such transactions are always subject to proofs of error.

An error in calculating the highest rate of interest, by which it exceeds the legal amount one hundred dollars or so, will not be considered as charging usurious interest.

The charge of the judge which is complained of, appears to the court fair and impartial. All questions of fact are left exclusively to the jury. They were correctly instructed, that fraud must be proved; that a mere error of calculation of the amount due, without any intention to defraud on the part of the plaintiffs, or their agent, would not be sufficient ground to annul the contract, but reduce the amount. The last sentence is, "usury cannot be proved without being pleaded." This is perhaps too broad a proposition, and not stated with sufficient limitations. Cases may well be imagined, in which it might appear from the petition itself, or the evidence offered by the plaintiffs, that more than ten per cent., was stipulated, and in such a case, even without plea, the court would be bound to notice it, inasmuch as the law refuses an action to enforce such a stipulation. But if the judge only meant that the proofs must correspond with the allegations of the parties, we think him correct. In this case we think the pleadings such, as to have authorised proof of usury, if any had existed. No evidence was offered and rejected, on the ground that usury was not *specially pleaded*.

Usury may be shown, and taken advantage of, even when it is not pleaded, if it appears from the petition, or evidence offered by the plaintiff, that more than ten per cent. was stipulated.

On examination of the judgment, we find it to correspond with the verdict.

Having disposed of these points, we come to the merits. The defendant being the mother of S. Bell, who died without issue, became his heir at law, and was seized of his estate at the moment of his decease, subject however to her right, with the authorisation of her husband, either to renounce it, or to limit her liability to creditors, by accepting with the benefit of inventory. She went before the parish judge, and with the concurrence of her husband, declared her intention to accept the succession with the benefit of inventory. The estate of the son became the paraphernal property of the mother, and she had a right to administer it, without the interference of her husband. The acceptance of the estate with the consent of the husband, was an engagement, as relates to creditors, that if she did not administer the estate according to law, as beneficiary heir, she would be personally liable for the debts; that if she neglected to take an inventory, and other conservatory steps; if by disposing of the property belonging to the estate as her own, she put it out of her own power to make to the creditors, a fair exhibit of the means of the estate to pay its debts, then the creditors should have a right to consider her as having forfeited the benefit of inventory, and made herself unconditional heir. But it is argued, that the husband consented only to an acceptance with benefit of inventory, and she cannot be made heir unconditionally without his consent. To this there are two obvious answers: first, that the husband by assenting to her acceptance with the benefit of inventory, necessarily assented to her administration, as beneficiary heir, and to all the legal consequences of her neglect or mal-administration; and, secondly, that the husband having died in August 1821, it does not appear, that it was then too late for her to liberate herself, by causing an inventory to be made. It was not too late if in the meantime her acts had been merely conservative. These transactions run through a series of years, and this suit was not instituted until April, 1827. It is not pretended that any inventory has ever been made, and some of the property was shown on the trial, to be still in possession of the defendant. It is in evidence also, that she gave up one store of the

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The estate of the son, dying without issue, leaving only his mother to inherit, becomes her paraphernal property, and she has a right to administer it, without the interference of her husband.

The acceptance of the succession of her son, by the mother, with the consent of her husband, and the benefit of inventory, was an engagement, as relates to creditors, that if she did not administer the estate according to law, as beneficiary heir, she would be personally liable for the debts.

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Where a mass of facts, relating to the settlement of a succession, and the accounts of a mercantile firm, and where fraud and circumvention is charged, are all submitted to a jury, who appear to have carefully allowed the debits and credits between the parties, their verdict will not be disturbed.

deceased, to her son, who acted as her agent. All the facts were laid before the jury, as well in relation to her management of the succession, as to the credits to which she was entitled, for the notes and accounts turned over to the plaintiffs as collateral security, and other payments made to them both before and after the written acknowledgment of the debt, on the 10th December, 1820 ; and also in relation to the errors in that settlement, and the alleged fraud and circumvention practiced by the plaintiffs. Those were questions peculiarly of the province of a jury. They seem to have credited her on the amount of principal, and accruing interest due on the 18th of February, 1825, with the sum of about thirteen thousand five hundred dollars. After a careful perusal of the record, we cannot discover that any credit was rejected, to which she was manifestly entitled, and this court cannot disturb the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.

WESTERN DISTRICT.
OPELOUSAS, SEPTEMBER, 1834.

BROUSSARD vs. BERNARD ET ALS.*

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT,
THE JUDGE THEREOF PRESIDING.

Customs result from a long series of actions, constantly repeated, which by **WESTERN DIST.** such repetition, and by uninterrupted acquiescence, acquire the force of September, 1834.
a tacit and common consent.

The particular custom, "*that the community of property continues, after the death of one of the partners, until inventory is made,*" is required to be proved by other partitions and divisions, that may have been made in the same place, and that it has prevailed without interruption.

The establishment of a custom, necessarily admits proof, other than that required to establish laws.

Parole evidence is inadmissible, to prove the customs of a country.

*The opinion in this case was pronounced and recorded, as of the September term at Opelousas, 1837, but was omitted to be published in Martin's Reports.

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The plaintiff had judgment, establishing the payments made by him, on account of the community, to the amount of fourteen thousand one hundred and nineteen dollars, which is adjudged to be an offsett to all the defendants' claims, and the plaintiff discharged from all further liability, for any property of the succession. The defendants appealed.

This cause was argued at the September term, 1827, at Opelousas, by *Mr. Brownson* for the plaintiff, and by *Mr. Simon* for the defendants. The opinion of the court, was made out at New-Orleans, sent up and entered of record, as of the September term, 1827.

Porter, J., delivered the opinion of the court.

This case grew out of an action, which was originally brought to ascertain, and settle the claims of the heirs of the late wife of the present plaintiff, to the property held in community, at the dissolution of the marriage, and to annul and set aside certain conveyances, which the plaintiff had made, of all the real and personal estate. He and those to whom he had sold, pleaded to the action, and after the cause stood at issue for some time, a decree was entered up by *consent*, declaring the deeds of sale null and void, directing an inventory and estimation of the property to be made; that the plaintiff should take the whole of the estate, at the price of the appraisement, and that after deducting the debts due by the community, he should pay the heirs of the wife their shares, at certain periods of time, therein mentioned.

The petition in this case, sets forth these facts, and avers, that an inventory had been made by the parish judge; that the whole estate amounted to eleven thousand nine hundred and forty-two dollars; that he has paid debts to a greater amount, viz: sixteen thousand and eighty-six dollars, and that the defendants refuse to ratify these proceedings, or carry them into effect. It concludes with a prayer, that they may be cited, that the whole of the proceedings may be homologated, and that the plaintiff may be discharged from all further responsibility.

The answer contains a general denial ; that the parties to this, and the former suit, were minors and married women, and that no legal consent could be given by them, to such a decree as that set forth in the petition ; that the conduct of the plaintiff was fraudulent, in delaying the inventory and appraisement, until property had greatly fallen in price ; that the sum, which the plaintiff now avers he had paid of community debts, exceeded by more than four thousand dollars, the amount stated in the answer, filed by him in the first suit ; and lastly, that after the death of his wife, he had acquired property which must enter into the community.

On the trial, the defendants offered evidence to prove, that after the death of their ancestor, the plaintiff had made large crops with the slaves, which were common property. This was rejected. They then offered to prove by parole, and by the record books of the Court of Probates of Attakapas, that it was the usage and custom of that county, and of the state of Louisiana, to consider the community as existing, until an inventory was made ; that the *Fuero Real* of the kingdom of Spain, was in force, where the succession was opened. This evidence was also rejected by the court, to which the defendants excepted.

Customs, according to our Civil Code, result from a long series of actions, constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent. *La. Code, art. 3.*

The particular custom, on which the defendants relied in this instance, is required to be proved by other partitions and divisions, that may have been made in the same place, and that it has prevailed without interruption. *Febrero, p. 2, lib. 1, cap. 4, § 4, No. 91. 3 Martin, 120.* The recognition of customs, by our Code, necessarily admitted proof, other than that required to establish laws. The custom which the defendants attempted to prove, was not as plaintiff objects, contrary to the general law of the land, but an exception to the ordinary rules, which regulate partnerships. If the proof of customs could be rejected, because it established something

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Customs result from a long series of actions constantly repeated, which by such repetition and by uninterrupted acquiescence, acquire the force of a tacit and common consent.

The particular custom, that the community of property continues after the death of one of the partners until inventory is made, is required to be proved by other partitions and divisions, that may have been made in the same place, and that it has prevailed without interruption.

The establishment of a custom necessarily admits proof other than that required to establish laws.

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Parole evidence is inadmissible to prove the customs of a country.

The books and records in the parish judge's office are legal and the proper evidence to prove a particular custom in relation to the continuation of the community after the death of one of the partners until inventory is made.

different from the law, no custom could be proved, for if it were not different, it would make a part of the law.

But the court, in our opinion, acted correctly, in rejecting parole evidence of this custom, first, because the law directs, it shall be proved in another manner; and second, because parole evidence is not the best of matters, which the law required to be executed in writing. There was no legal ground, for rejecting the evidence of the books of the parish judge; it was precisely that species of proof, which the law demands, in relation to this custom, and the cause must be remanded, to give the party an opportunity of producing it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; that the cause be remanded for a new trial, with directions to the judge *a quo*, not to reject the record books of the parish of St. Martin, to prove that the *Fuero Real* was in force there; and it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

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OF THE SEVENTH PRESIDING.

Evidence consisting of extracts from the *procès verbal*, of commandants and parish judges in Attakapas, for a long series of years, in which the phrase "*afin de faire cesser la communauté*" is used in the caption to inventories, with other phrases of similar import, is insufficient to prove the existence of a custom in such place, that a community of acquests and gains continued between the surviving husband and the heirs of his deceased wife, until inventory is made.

When there is no evidence to satisfy the court, that any succession has been settled and partaken, in conformity with an alleged or supposed custom of a place, recognising the continuance of the community after the marriage is dissolved, *until inventory is taken*; and nothing like a course of judicial acts recognising such a custom is shown, it will not be considered as proved to exist.

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A community of acquests and gains as such, ceases to exist at the moment of the death of one of the partners, with all the legal effects resulting from it. Each party is seized of one undivided half of the property composing the mass; and the surviving party cannot alienate the share not belonging to him.

If the survivor of a community of acquests and gains, continues to administer it without provoking a partition and is tacitly permitted to enjoy the common estate, he will be considered, except in cases where he may have a legal usufruct, as intermeddling, and his responsibilities will be those of a *negotiorum gestor*.

A judgment rendered by a court of competent jurisdiction, between parties legally before it, cannot be questioned indirectly and collaterally.

Minors are bound by the judgments of courts of competent jurisdiction, when they come before them properly represented, in the same manner as other persons.

The *Fuero Real* was not in force in Louisiana in 1816.

While a judgment remains in force and unappealed from, the rights of the parties are concluded by it, leaving to those under age their legal recourse.

Property purchased by the husband after the dissolution of the community by the death of his wife, becomes his *sole* property; but he is accountable for one-half of the net revenues derived from the common property after the death of his wife, and up to the time of making the inventory.

This case was remanded for a new trial at the September term of this court, held at Opelousas, in 1827. See *preceding case*, ante 211.

On its return to the District Court the defendants were permitted to prove by the records of the parish judge's office, that according to the customs of the county of Attakapas, a community of property continued after the death of one of the partners between the survivor and the heirs of the deceased partner until an inventory is made.

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The district judge decided "that the defendants having proved that the *Fuero Real* of Spain was in force in this state at the time of the death of the wife of the plaintiff, in 1816, that the community of goods and property and acquests and gains which formerly existed between the parties, *continued* after the death of the wife, to the 15th November, 1820, the time of making the inventory." He then went on to annul the decree rendered in the first suit, which directed an estimation and deduction of all the debts paid by the husband, from the community property, after the death of the wife, and before taking the inventory, before a partition of the community was to be made. Judgment was then rendered in favor of the defendants for one-half of the community as estimated in the inventory taken in 1820, or for half the sum of eleven thousand nine hundred and forty two dollars, to be satisfied out of the property of the community that existed in the possession of the husband at the death of his wife. From this judgment the plaintiff appealed.

Brownson for the plaintiff contended, that the decree rendered between these parties must be enforced, as nearly all of the heirs of Madame Broussard were majors and married women at the time it was rendered by consent.

2. It will also appear from the estimate of the community, as it existed at the wife's death, and the amount of debts since paid on its account, that there was not, and is not now in fact any property or portion of the community, which the heirs can claim.

3. But suppose there should be found any estate to be divided between these claimants, and supposing that the former judgment should be found injurious to the present defendants, I contend that this court can only make restitution to the minors, and not to the majors and married women, who were legally represented at the rendering of the decree.

4. Minors it is admitted are privileged to demand restitution, even against a judgment under the Spanish law, but they must show that they have been injured. *Partida 6, tit. 19, law 2.*

5. But can the restitution in favor of the minors, benefit the majors? Their interests are not indivisible. The law itself divides their interests, so that each is entitled to his virile portion of the property, &c.

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6. It is argued that the community of acquets and gains, continued after the dissolution of the marriage, until the taking of the inventory. If so, then all the property of which it was composed, was included in the inventory. On the subject of the continuation of the community, after the death of one of the parties, the court is referred to *Febrero*, part 2, lib. 1, chap. 4, § 4, from No. 86 to 96.

7. The plaintiff denies the existence of the *Fuero Real* of Spain in Louisiana, or any such customs in the county of Attakapas, as those contended for by the defendants' counsel.

Simon for the defendants.

1. This suit is brought to carry into effect a certain judgment of the District Court, unappealed from, which judgment was rendered by consent between the parties. That consent I contend, was given in error. Three of the plaintiffs in that suit, and who are defendants in this, were minors at the time the judgment was rendered. Judgment in the present case, was rendered in favor of the defendants generally, and the plaintiff appealed.

2. The defendants plead restitution against the first judgment, which plea should have effect, at least in favor of the minors. Judgment by consent, under such circumstances, cannot stand. *Partidas, Moreau and Carlton edition, vol. 1, p. 317, laws 1, 2, 3. Vol. 2, p. 1153, law 3.*

3. The injury resulted in this case, in not setting up the proper defence for the heirs, and in letting judgment go against the legal rights of the parties. We now take the ground that the community *continued to exist between* the surviving husband and the heirs of his wife, until the making of the inventory; that all the fruits arising from the property, since the death of the wife, up to the time of the inventory, belong to the community, and ought to have been accounted for by the husband, to the community. If this position be

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true, its effect was disregarded at the rendition of the judgment, which considered the community dissolved by the death of the wife. In this respect, the judgment, as far as regards the minors, is not binding. They at least are entitled to restitution.

4. The community continues between the surviving partners, and the heirs of the deceased one, until an inventory is made. 4 *Febrero ad. book 1, chap. 4, § 4, Nos. 86, 87 and 88, p. 261. Ibid, vol. 3, chap. 9, § 1, No. 12, p. 181.*

5. According to the custom of Orleans, if no inventory is made, the community continues with the collateral heirs. *Pothier's Communauté, vol. 2, p. 229, § 792, 793, p. 260, No. 808. 3 Martin, 120.*

6. In this case it is proven, that it was always customary in the county of Attakapas, to make settlements of the community on the basis of its continuance, up to the time of taking the inventory. The acts and records from the parish judge's office in St. Martin, embracing a long series of dates, and which are in evidence, show the existence of this custom; and that the *Fuero Real* of Spain existed, and was in force in Attakapas, at the time of the death of plaintiff's wife.

7. All the profits that have been made by the plaintiff, since the death of his wife, up to making the inventory, and with which profits he has paid the debts of the community, ought to have been partaken between the parties; that is, the plaintiff should not be allowed any credit for the payment of those debts, which were extinguished by said profits.

8. The District Court has rendered a judgment in favor of the defendants, for their half of the inventory, without allowing any credit for the debts paid with the profits. We contend, that all the defendants are entitled to that half, and at all events, that the three minors are entitled to their portion, which would be a fourth of the amount of the inventory.

9. In relation to the married women, who were interested in the first suit, and among the defendants in this; and whose husbands in that consented to the judgment, I contend that the judgment is not binding on them, and that they with the minors, are entitled to restitution.

Brownson in reply, denied that there was any evidence of any debts having been paid by the fruits and profits of the late community. WESTERN DIST.
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2. The debts were chiefly paid by contracting new debts on the part of the plaintiff. If evidence to this point had been taken, it would have shown that the plaintiff, during the pendency of this suit, had failed in consequence of them.

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Bullard J., delivered the opinion of the court.

This case was before the court, at a former term; the judgment first rendered, was reversed, and the case remanded, in order to enable the parties, to exhibit certain evidence, of the existence of a custom. On the new trial, written evidence was produced, consisting of documents from the archives of the parish of St. Martin, some of ancient and some of recent date, which satisfied the judge *a quo*, that the custom, of considering the community as continuing, after the death of one of the parties, until an inventory was made, was in existence in Attakapas, and that the *Fuero Real* was in force there, at the death of Madame Broussard, as late as the year 1816.

This court held, at that time, that the particular custom relied on, could only be proved by other partitions and divisions, which may have been made in the same place, and that it prevailed without interruption, upon the authority of *Febrero*, p. 2, lib. 1, chap. 4, § 4, No. 91. and 3 *Martin*, 120.

The evidence offered on the trial, and which is annexed to the record, consists of numerous inventories or extracts, from *procès verbaux*, by several successive commandants, on proceeding to take inventories, in which they make use of such expressions as the following: that they had proceeded to make an inventory with appraisement, &c. "*afin de faire cesser la communauté*," &c., or of similar import. There is no evidence to satisfy us, that any succession has been settled and partaken, in conformity with such supposed custom. Nothing like a course of judicial acts, recognising such a custom, is shown. The expressions embodied in the various inventories before us, amount to nothing more, in our opinion,

Evidence consisting of extracts from the *procès verbal*, of commandants and parish judges in Attakapas for a long series of years, in which the phrase "*a fin de faire cesser la communauté*" is used in the caption to inventories, with other phrases of similar import, is insufficient to prove the existence of a custom in such place, that a community of acquiescence and gains continued between the surviving husband and the heirs of his deceased wife, until inventory is made.

When there is no evidence to satisfy the court that any succession has been settled and partaken in conformity with an alleged or supposed custom of a place, recognising the continuance of the community after the marriage is dissolved, until inventory is taken; and nothing

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like a course of judicial acts recognising such a custom is shown, it will not be considered as proved to exist.

A community of acquests and gains, as such, ceases to exist at the moment of the death of one of the partners, with all the legal effects resulting from it. Each party is seized of one undivided half of the property composing the mass; and the surviving party cannot alienate the share not belonging to him.

If the survivor of a community of acquests and gains, continues to administer it without provoking a partition, and is tacitly permitted to enjoy the common estate, he will be considered, except in cases where he may have a legal usufruct, as intermeddling, and his responsibilities will be those of a *negotiorum gestor*.

than the usual style of notaries, which add nothing to the force and effect of the act. An inventory without such enunciation of the purpose for which it was made, would not be less an inventory.

That a community of acquests and gains, as such, continues after the death of one of the partners, with all the legal effects resulting from such a relation, with authority in the husband, if he should survive, to be still regarded as the head of the community, with power to bind the common property by new contracts, and to alienate it without restraint, is a proposition so repugnant to all our notions of a community, and so subversive of first principles, that it cannot be for a moment admitted. On the death of one of the spouses, the community, in a legal sense of the word, is unquestionably terminated. Each party is seized of one undivided half of the property, composing the mass, and the surviving party cannot validly alienate the share, not belonging to him. If the survivor continues to administer, without making a partition, and is tacitly permitted to enjoy the common estate, he will be considered, except in cases where he may have a legal usufruct, as intermeddling, and his responsibilities will be those of a *negotiorum gestor*.

The object of the present suit, is to compel the defendants, to come to a final liquidation and settlement of the community, formerly existing between Michel Broussard and his late wife, according to a decree, rendered by consent of all parties concerned, in 1820. The defendants in this case, who were plaintiffs in the first suit, seek to avoid the effect of that judgment, on the allegation, that it was rendered by consent, that some of them were minors at the time, and some married women, and that they were injured by said judgment, and are entitled now to restitution.

The action upon which the judgment was rendered, in 1820, was prosecuted by the present defendants, against Michel Broussard, and other persons, to whom he had conveyed, during the life-time of his wife, certain property, belonging to the existing community of acquests and gains. The principal object of that suit appears to have been, to

annul that alienation, as made in fraud of his wife. The purchasers, who were parties, pleaded among other things, that the right of action was prescribed; that a year had elapsed since the sale, and that in cases of alleged fraud, the revocatory action could not be maintained, after the expiration of one year. The judgment was finally entered by consent, annulling the alienation, restoring the property to the community, and permitting the surviving husband to retain it as his own, on certain conditions.

If we take the whole judgment together, it is not easy to comprehend, how the present defendants have been aggrieved by it. Without that judgment, the whole property would yet belong to Isidore Broussard, or Landry, to whom it was conveyed, before the death of Madame Broussard. It is said, that the consent of the husband, and of the tutors, amounted to an alienation of the property of the wife and minors. But it must not be overlooked, at the same time, that the same consent tended to acquire the same property, which without it, may have been irrevocably lost to them.

The decree rendered in the present case, sustains to a certain extent, the exception of the defendants, and proceeds to set aside the first judgment, as founded in error of law, and prejudicial to the minors and married women, and condemns the plaintiff to pay about six thousand dollars, the estimated value of the property in the inventory.

It has been contended by the counsel for the appellant, that the first decree rendered by consent, if objectionable, was not absolutely null, but merely erroneous, and can only be avoided by action of nullity, or by appeal.

This court has held, that a judgment rendered by a court of competent jurisdiction, between parties legally before it, cannot be questioned indirectly and collaterally, and in a recent case, that minors properly represented, are equally bound; and the same doctrine was recognised in the case of *Martin vs. Martin's heirs*. 5 *Martin*, N. S. 165.

We are therefore of opinion, that the court erred, in declaring that the *Fuero Real* was in force in Louisiana, at

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A judgment rendered by a court of competent jurisdiction between parties legally before it, cannot be questioned indirectly and collaterally.

Minors are bound by the judgments of courts of competent jurisdiction, when they come before them properly represented, in the same manner as other persons.

The *Fuero Real* was not in force in Louisiana in 1816.

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While a judgment remains in force and unappealed from, the rights of the parties are concluded by it, leaving to those under age their legal recourse.

the death of Madame Broussard, and in setting aside the judgment heretofore rendered, and yet remaining unreversed. While that judgment remains in full force, it ought to regulate the rights of their parties in the premises, leaving to those who were not of age at the time, their legal recourse.

Before any final settlement of the community can be made, it is necessary to examine the substance and extent of that decree. It begins by declaring, that the property which had been sold by Broussard to Isidore Broussard, and by the latter to Landry, belonged in full right and *bonâ fide*, to the parties jointly, the same, together with its natural fruits and increase, being a community between said Michel and the heirs and representatives of his wife. It then proceeds to decree, that all the property mentioned in the deeds, shall be partaken and divided between the parties, the heirs taking their share in money, at certain times of credit, and the defendant retaining the property, at an appraisement to be made afterwards; and the sums coming to the heirs, being one-half of that estimation, after deducting the amount of debts due by the community, and which the defendant may have paid, after the death of his wife. It is silent as to the revenues derived from the property, from January 25th, 1816, up to the time of the inventory.

Property purchased by the husband after the dissolution of the community by the death of his wife, becomes his sole property; but he is accountable for one-half of the net revenues derived from the common property after the death of his wife, and up to the time of making the inventory.

It is contended by the defendants, in their answer, that the property acquired by the plaintiff, after the death of his wife, belongs to the community. We are of opinion, that it forms the sole property of the plaintiff, but that he is accountable for one-half the net revenues, derived from the common property, after the death of his wife, and up to the time the inventory was made, in November, 1820. At that period, we consider his obligation to account for the revenues, to have ceased, because he was authorised to consider the whole property as his own, on paying interest, according to the judgment.

According to this view of the rights of the parties, under the existing judgment, we are of opinion, that the final settlement and liquidation of the community, ought to be effected as follows: first, all the property mentioned in the

inventory, in the possession of the plaintiff, at the price therein estimated ; second, crediting the plaintiff for all debts contracted before the death of his wife, and since paid by him, and thirdly, charging him with one-half of the net revenues, which the defendants may prove to be derived from the use of the common property, from the 25th January, 1816, till the 15th November, 1820.

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As the judgment in question, related only to certain specific property, and it does not appear certain, that it was the only property belonging to the community, at the death of Madame Broussard, we are of opinion, that the defendants are not precluded from showing the existence of other joint property at that time, and that, in its partition, the defendants are not bound by the said judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed ; and it is further ordered, adjudged and decreed, that the parties proceed before the parish judge, of the parish of St. Martin, to the final settlement of the community, lately existing between Michel Broussard and Anastasie his wife, according to the principles expressed in this opinion, and that the defendants pay the costs of the appeal.

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THEALL vs. THEALL ET ALB.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARY.

In the construction and interpretation of wills, the intention of the testator must be sought in the words *he has used* in the will, and not *aliunde*.

Constructions and interpretations of wills, are not to be resorted to for the discovery of the testator's intention, when he has used none but plain unequivocal expressions.

A testator must be presumed to know that his own property alone can be the subject of his disposition.

So where a community of property exists, and the testator in his olographic will declares he wishes "*the rest of his property, (after making legacies) both real and personal, divided as follows: One-half to his wife, and the other half to his brother's children,*" &c: *Held*, that the wife first takes half the community, and one-half of the other half, after deducting debts and legacies.

This is an action of partition. The plaintiff as surviving wife of the late Joseph Theall, instituted her suit in the Probate Court, for the parish of St. Mary, against the dative testamentary executor, and the testamentary heirs and legatees of her deceased husband, for a partition of his succession, according to the provisions of his olographic will, duly admitted to probate. The will was dated the 9th February, 1832, and the testator died during that year. After making several specific legacies, on particular titles, to his collateral relations, the testator proceeds with the following bequest. "I give my wife Nancy Theall, all my household and kitchen furniture, with the cattle and hogs that are remaining. The rest of my property both real and personal, I wish divided in the following manner, that is to say: *One-half of all to my wife Nancy Theall. The other half to my brother's children,*" &c.

In pursuance of the above clause in the will, the plaintiff prays to have decreed to her one-half of the estate of her late husband, comprising the community of acquests and gains; the specific legacies, on particular title, bequeathed to her, and one-half of all the residue of the said succession,

after paying the specific legacies, on particular titles, contained in the will.

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The defendants alleged that it was the intention of the testator to dispose of the whole of the property which he possessed, as well his hereditary property, as that held in community with the plaintiff at the time of his death, and that the plaintiff was only entitled to a moiety of the whole estate, after paying the legacies, &c. The evidence consisted of the will and the inventory of the succession. It also appeared that a community of property existed between the spouses at the time of making the will, and at the death of the husband. The wife (now plaintiff) claims one-half of the succession by the operation of law; and one moiety of the other half (after paying the legacies) under the will.

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The probate judge decided that it was the intention of the testator, to dispose of all the property (both community and hereditary) of which he should die possessed; and that the dispositions contained in the will in favor of the wife, were intended to be in lieu of all her claims against her husband's succession, and on accepting the advantages conferred by the will, she is bound to receive them in full satisfaction, and discharge of all her legal claims. The plaintiff appealed from this decree.

Lewis and Bowen for the plaintiff.

1. The will must be construed so as to give it effect if possible. *La. Code, art. 1706. 6 Toullier, p. 355 n. 321.*

2. The words of the will must be understood in their usual sense, or common acceptance. *La. Code, art. 1705.*

3 Meaning and effect are to be given to *all* the words of a will according to their legal acceptance. 1 *La. Reports*, 161-2, and 2 *La. Reports*, 509.

4. The words of the will must have their full effect, when there is no ambiguity in their meaning, and even where the testator is known to have habitually used a word in an improper sense, still the usual sense of the word will have its effect. 6 *Toullier*, 342, n. 306, p. 343, n. 309, p. 345, n. 311 and n. 312, and 313, and p. 350.

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5. The words "*my property*," in the will cannot apply to the wife's half of the community, because,

1. One half of the community property, was *hers, independent of the testator's will*, and in it she had a *vested right* at the time the will is dated, as well as at his death. 4 *La. Reports*, 188 and seq. *Nov. Recop. lib.* 10 tit. 4, l. 1.

2. If a husband bequeath *any thing* to his wife, it shall not be taken out of her *gananciales*, but she shall have it *besides them*. *Nov. Recop. lib.* 10, tit. 4, l. 8.

3. To apply them in any other way, would be to make the testator show an intention to defraud his wife, under the specious pretence of giving her a legacy ; and this would be contrary to every presumption of law which ever infers an honest rather than a dishonest intent, unless the latter be palpable.

Brownson for defendants.

1. Contended that it was the intention of the testator to dispose by *will*, of the *whole* of the property of which he should die possessed. According to this construction, the widow would be entitled only to *one-half* of the whole estate, after paying the legacies, debts, &c.

2. The testator being at the head of the community, evidently *intended* by the expression, "*the rest of my property*," to include all the estate which existed between him and his wife, at his death, and which he intended should be so divided as to give one-half of the net amount, after the debts and specific legacies were paid, to his wife, and the other half to be divided among his collateral relations. Any other construction would be in violation of the intentions of the testator.

Garland on the same side, argued to show that the construction of the will, contended for by the plaintiff, was contrary to the evident intentions of the testator. In construing wills, the universal rule is, that the *intentions* of the testator must govern.

2. This was an olographic will, written by the testator himself a plain unlettered man, whose expressions taken in connexion with the circumstances around him, ought to be

construed with reference to what he intended and did in effect say, than to strict grammatical arrangement.

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Martin, J., delivered the opinion of the court.

The only question which this case presents, depends on the meaning of the last clause of the will of Joseph Theall, the plaintiff's late husband. After making several specific legacies, one of which is in favor of the plaintiff, of the household and kitchen furniture of the testator, and some cattle and hogs, the will concludes by the following clause: "The rest of my property, both real and personal, I wish to be divided in the following manner: that is to say, one-half of all to my wife; the other half to my brother's children: that is to say, one-half to James Theall's daughter Nancy, the other half to John Theall's children."

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On the application of the wife for a partition, the Court of Probates expressed its opinion, that it was the intention of the testator, in this clause, to make a disposition of all the property, of which he should die possessed, as well that which he held in community with his wife, as that which composed his hereditary and proper effects; and that the disposition in the will in favor of the wife, was intended to be in lieu of her claim on, or against his succession; and that in accepting the advantages conferred on her by the will, she was bound to receive them in full payment, satisfaction and discharge of all her legal claims. The partition was directed to take place according to the opinion thus expressed; and the plaintiff appealed.

The counsel for the appellee has contended that the will must be construed according to the evident intention of the testator, who must be believed by the expression "*all my property, real and personal*," to have included the property which he had acquired by his industry and economy, although the laws of the country gave to his wife one-half of the acquets and gains made during marriage. That he does not use the words "*I give and bequeath*," in the clause under consideration, but merely expresses the manner in which it is his intention a division should be made. And it is not to be believed, that while the law gave to his wife, one-half of the profits of his industry during the marriage, he could be tempt-

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In the construction and interpretation of wills, the intention of the testator must be sought in the words he has used in the will, and not *alimunde*.

Constructions and interpretations of wills are not to be resorted to, for the discovery of the testator's intention, when he has used none but plain unequivocal expressions.

A testator must be presumed to know that his own property alone can be the subject of his disposition.

So where a community of property exists, and the testator in his otographic will declares, he wishes "the rest of his property (after making legacies,) both real and personal, divided as follows: One half to his wife, and the other half to his brother's children" &c. Held, that the wife first takes half the community, and one half of the other half, after deducting debts and legacies.

There cannot be a truer position, than that under which courts are directed in the construction or interpretation of wills, to be guided by the intention of the testator. This intention must be sought in the words, which he has used in his will. It is not to be sought *alimunde*.

But constructions and interpretations, are not to be resorted to for the discovery of the testator's intention, when he has used none but plain unequivocal expressions. Candles are not to be lighted, when the sun shines brightly.

A testator must be presumed to know, that his own property only, can be the subject of his disposition, and that he cannot dispose of the property of others.

It is neither extraordinary, uncommon or surprising, that a man should give one-half of his property to his wife, when he bestows the other half on his nephews and nieces.

If a declaration of a testator, that he wishes his estate to be divided between his wife and his collateral relations, is evidence of his intention, that the latter should enjoy the portion coming to them; it is difficult to comprehend, why the declaration should be rejected, when presented as evidence of the liberality of the testator towards his wife.

The bequests appear to us, absolute and unconditional, and we are unable to concur in the opinion, expressed by the Court of Probates, that it is clogged with the condition, that the wife should renounce her legal rights, not resulting from the will.

The wife is, in our opinion, entitled to one-half of the amount of the property of the community, after its debts are deducted. The other half, added to the husbands' private property constitutes his estate. The entire amount of this estate, after his private debts are paid, is subject to the disposition he has made of it, in his will. One-half of the specific legacy, in favor of the plaintiff, and the whole of the other specific legacies are to be deducted, the balance forms the residue, which is to be divided in two equal parts, one of which belongs to the wife, and the other to be divided,

one-half to Nancy, the daughter of James Theall, and the remaining half to be divided among the children of John Theall. WESTERN DIST.
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It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled and reversed; and proceeding to give such judgment, as in our opinion, ought to have been rendered below, it is ordered, adjudged and decreed, that the partition of the estate of Joseph Theall deceased, be made according to the opinion we have expressed; and that the case, for that purpose, be remanded to the Court of Probates; the appellees paying costs in this court.

RASPILLIER vs. BROWNSON.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
OF THE SIXTH PRESIDING.

An intervenor in a suit commenced by attachment between the original parties, although he succeeds in obtaining judgment, cannot proceed on the attachment bond against the surety for any supposed damages, because he is no party thereto.

There is no privity of contract between the intervenor in a suit, already begun by attachment, and the surety in the attachment bond, and he cannot avail himself of the penalty in the bond.

The plaintiff took a rule on the defendant, to show cause why he should not be made liable as surety in an attachment bond. The facts show, that one Miles, in Kentucky, sued out an attachment against William L. Brent, then residing in Attakapas, in a suit on a promissory note of the latter, for two thousand three hundred and fifty dollars, given for the price of slaves. Mr. Brownsong was the surety in the attachment bond executed by the plaintiff Miles. While this suit was

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pending, Raspillier, the present plaintiff, intervened and claimed the amount of the note sued on, as having become the purchaser thereof, and entitled to receive the proceeds.

After several years litigation, he finally obtained judgment for the net amount of the note, *without interest*. See case of *Miles vs. Oden et als.* 8, *Martin, N. S.* 214.

Raspillier now contends that he has sustained damages to the amount of his costs and interest on Brent's note, and that the attachment bond in the suit of *Miles vs. Oden et als.*, in which Brent was a principal defendant, enured to his benefit. He seeks to fix this liability on the defendant, as surety in said bond.

Mr. Brownson appeared, and showed for cause that he could not be rendered liable on the attachment bond in this way; that if liable at all, he could only be made so by a civil suit in the ordinary way of petition and answer. The rule was discharged and the plaintiff appealed.

Brownson in propria persona, submitted the case without argument, no counsel appearing for the plaintiff.

An intervenor in a suit commenced by attachment between the original parties, although he succeeds in obtaining judgment, cannot proceed on the attachment bond against the surety for any supposed damages, because he is no party thereto.

There is no privity of contract between the intervenor in a suit, already begun by attachment, and the surety in the attachment bond, and he cannot avail himself of the penalty in the bond.

Bullard J., delivered the opinion of the court.

The appellant, C. Raspillier, having intervened in a suit commenced by attachment by Miles, against Brent, in which the present appellee was attorney and security on the attachment bond, and judgment having been rendered in his favor, for the amount claimed by him except interest, took a rule on the appellee to show cause why judgment should not be entered against him, for the amount of damages, sustained by him, as the real party in interest.

To this rule the appellee showed for cause, that he was not a party to the suit, and that if he was liable for damages, as surety on the bond, they could be recovered only by regular suit. The rule was discharged, and the complainant appealed.

We are of opinion that the court did not err in discharging the rule. Besides the obvious objection that Raspillier was not a party to the bond, and that there existed no privity of contract between him and the appellee, it appears that final

judgment had already been rendered in the case, as to the principal demand, and it was too late to engraft upon it any new incidental question. Nothing remained to be done but to execute the judgment rendered on the appeal.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

The captain of a steam-boat, owned by several persons, (including the captain) has authority to contract for freight, to be carried according to the usual trade of the boat; and all the owners are bound by such contract, even without their assent given thereto.

The captain, as agent of a steam-boat, may make contracts to take effect in future, to carry freight according to the usual course of trade of said boat.

Where the captain of a steam-boat, contracts to carry certain freight, at a future day, between the well known *termini* of his voyage, and fails or violates such contract, the owners of the boat are liable in damages, for all the loss sustained by the party, with whom the contract is made.

The measure of damages, and just criterion of loss to the owner, is the value of his property, at the place of destination, after deducting freight.

The plaintiff alleges, that through his agents in New-Orleans, in February, 1829, he employed captain R. W. Curry, commander and part owner of the steam-boat Attakapas, then running in the trade, from St. Martinville to New-Orleans, to carry five thousand seven hundred gallons of molasses, worth one thousand four hundred and twenty-five dollars, from the

WESTERN DIST. September, 1834. sugar plantation of Messrs. Dubuclet & Benoit, on the Bayou Teche, to New-Orleans; that to carry the said contract into

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effect, the plaintiff, by his agents, Fisher, Burke & Watson, in New-Orleans, shipped one hundred and sixty empty barrels, to be filled up with said molasses, at the said plantation, and shipped and returned from thence to New-Orleans, for which a freight of one dollar and twenty-five cents per barrel, was to be paid. The plaintiff further charges, that the said captain Curry failed to deliver more than sixty of the empty barrels, until long after the time agreed on; and that he failed to receive the said barrels, when filled up, and to return them according to agreement, as specified in a bill of lading for the empty barrels, and wholly failed and refused to receive the said molasses, although repeatedly requested to do so; and that the molasses remained two months, after they were to have been shipped, and until the close of the navigation, in July, 1829, when by fermentation and leakage, the molasses, in consequence of the failure of captain Curry to perform his contract, were wholly lost, except about fifty barrels, which were sent by another conveyance. He estimates the loss sustained, in consequence of the non-fulfilment of said contract, at one thousand six hundred dollars, for which he avers the captain and owners are liable, and prays judgment accordingly.

The defendants plead a general denial; that they were not bound by the contract, which appeared to be made by one B. Lafosse, as clerk of the steam-boat, who signed the bill of lading; that he had no authority to sign such an instrument, and that the contract alleged to be made, in plaintiff's petition, is entirely out of the usual course of business, which the said clerk was engaged to perform; they aver, that if they were bound, they have fully complied with their obligation; that they delivered the one hundred and sixty empty barrels as directed, which were never put in a situation to be returned by the steam-boat; so that the non-compliance with the contract, as alleged, was solely the fault of the plaintiff or his agents; that if all of said empty barrels were not delivered, it was owing to the danger of the

navigation, for which they are not responsible. They aver, that more than one year has elapsed, previous to instituting this suit, from the time of the contract; consequently the action is barred by the prescription of one year.

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The plaintiff proved by several witnesses, the agreement to carry the molasses to New-Orleans, as alleged; that captain Curry, when he delivered the last lot of empty barrels, late in the season, from another steam-boat, (the *Lady Lafayette*) positively refused to receive the molasses, at the sugar plantation of Messrs. Dubuclet & Benoit; and that the molasses, with the exception of about fifty barrels, were wholly lost to the plaintiff; and the remaining fifty were shipped by another conveyance, but were so sour and leaky, as to be scarcely of any value.

The clerk of the steam-boat swears, he filled up and signed the bill of lading, according to the orders of captain Curry. It stipulates as follows:

“Shipped in good order, &c., by F. B. & W., on board the steam-boat *Attakapas*, whereof Curry is master, now lying in the port of New-Orleans, one hundred and sixty barrels, deliverable to Messrs. Dubuclet & Benoit, &c., to be filled up with molasses and returned to the shippers, &c., in like good order and condition, at the port of New-Orleans, (the dangers of the seas only excepted) unto the shippers, (F. B. & W.) or to their assigns, he or they paying freight for said barrels of molasses, at the rate of one dollar and twenty-five cents a barrel, &c. In witness whereof, the master or purser of the said vessel, hath affirmed to three bills of lading, &c. Dated, New-Orleans, the 6th day of February, 1829.”

“B. Lafosse.”

The defendants proved, that captain Curry stopped once for sixty or seventy barrels, which were not then ready.

Dubuclet proved, that he and Benoit sold the quantity of molasses stated, (five thousand seven hundred gallons) for thirteen horses, estimated at seven hundred and fifty dollars. It was also proved, that Fisher, Burke & Watson were the agents of plaintiff, and that the molasses were worth

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The defendants' counsel moved the court to charge the jury, that the contract arising on the bill of lading, to carry property or freight, at a *future* day, made by the captain, was not binding on the owners of the boat, unless the captain was specially authorised to make such a contract, and that the power of making such a contract, is not included among the general powers possessed by captains to make contracts, which are binding upon the owners of vessels, &c. The judge refused, and charged the jury to the contrary of that requested. The defendants' counsel moved further, that the claim of the plaintiff, being for damages arising from the non-delivery of the barrels, &c., was barred by the prescription of one year; but the judge charged the jury, that the plaintiff's claim consisted of two branches, one for damages, for the non-delivery of the barrels received on board; and the other for damages, for not taking on board molasses, &c.; that as to the first claim, the plea of prescription had attached; but that as to the second, the court was of opinion, that said plea was not applicable. The defendants moved several other clauses, to be given in charge to the jury, to all of which, and those stated, the judge refused, and a bill of exceptions was taken to said charge.

The jury returned a verdict of nine hundred and eighty-two dollars fifteen cents, for the plaintiff, and after overruling a motion for anew trial, the district judge rendered judgment, in conformity to the verdict.

The defendants appealed.

Bowen and Lewis, for the plaintiff.

1. In this case, the defendants resist the claim for damages, on the ground that they were not put in delay before suit. This was not necessary, as a party may be *en demeure* by the mere operation of law, when the breach of the contract is declared by the law, equivalent to a default. *La. Code*, art. 1905, No. 3.

2. When the thing to be given, or done, by the contract, was of such a nature, that it could only be given or done,

within a certain time, which has elapsed, or under certain circumstances, which no longer exist, the debtor need not be put in delay, to entitle the creditor to damages. *La. Code, art. 1927, No. 1.* WESTERN DIST.
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3. *Merlin*, after laying down the rule, that a special demand is necessary to put a debtor *in delay*, unless the contract stipulates, that it shall be fulfilled in a fixed time, states as exceptions to the rule, cases in which the debtor is *en demeure*, without a subsequent demand : 1. Conventions which relate to commerce, as an agreement to carry merchandise to a fair, when the debtor is in delay, if he lets the time of the fair pass, without carrying the goods, &c. 2. Conventions which must be executed in a certain time, as repairing a wall, in danger of falling, &c. 3 *Merlin's Reports, Verbo Demeure, p. 515.* 2 *Ibid. Verbo Commintotre, p. 491.*

4. This is a commercial contract, and is not to be governed by the technical rules respecting *demeure*, contained in our Code, but by the commercial law. The *La. Code* contemplates the existence of a future Code of Commerce. See *art. 2823.*

5. Until a commercial code is adopted, commercial conventions must be determined by the existing commercial law, as recognised in the Code, in relation to bills of exchange and promissory notes. Other commercial contracts are decided by commercial law. *La. Code, 1908.* 3 *La. Reports, 225.*

6. The captain or master of the boat, who made this contract, had authority to make it, which was binding on the owners. The bill of lading was signed by the clerk, which is usual, and is done by the orders of the master. A bill of lading may be signed by the mate or clerk. *Jacobson's Sea Laws, 94, 172.*

7. The owners are responsible for every contract of the master, relative to the usual employment of the vessel. *Abbott on Shipping, 152, 132, 133, 134.*

8. But if a vessel be built for passengers only, the owners would not be liable for the contract of the captain, to take

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freight: or if it were employed in a particular trade, they would not be responsible for the contract of the master, to employ her in a different trade. *Abbott on Shipping*, 134.

9. This court has decided, that by the law of this state, owners are liable for contracts of freight or passage, entered into by the captain. 6 *La. Reports*, 319.

10. This contract was in part executed, by taking in and delivering the empty barrels, &c., and a voluntary execution involves a renunciation of all exceptions to it. 6 *La. Reports*, 530.

11. The prescription of one year, cannot be pleaded to this action, which is not a *quasi delict*, but a breach of contract; and the article 3501 of the *La. Code* relied on, applies only to *quasi delicts*. 2 *La. Reports*, 429. 3 *Ibid.* 591.

12. If they claim it under that part of article 3501, which gives it as an exception to the action, for the delivery of goods or merchandise, we answer, that this part of the article has no relation to this action, which is brought, not to recover damages for the non-delivery of shipped articles, but for not receiving on board merchandise which was ready, and contracted to be shipped by defendants.

13. The court erred in charging the jury, that prescription barred that part of our claim, which demanded damages for the loss of the one hundred and twenty barrels, by which the jury only gave damages for the loss sustained on the molasses. The judgment ought to be amended, so as to allow the value of the barrels.

Simon & Brownson, for defendants.

1. The contract on which this suit is instituted, called "bill of lading," containing a stipulation to receive freight at a future period, is not obligatory on the owners, unless the captain was specially authorised to make such a contract; and that authorisation is not included in the general powers which captains have, in the conduct and administration of their crafts. *Jacobson's Sea Laws*, p. 94. *Abbott on Shipping*, p. 132, 133, 134.

2. The plaintiff's claim being for damages, resulting from the non-delivery of certain barrels put on board, the claim is prescribed by the prescription of one year. *La. Code*, art. 3501. WESTERN DIST.
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3. The stipulation contained in *the bill of lading*, to receive molasses on board the boat, at a future period, being in its nature a *synallagmatic* contract, it is not valid as such, having been signed only by one of the parties. *La. Code*, art. 1758, 1759, 1791, 1792, 1793, 1794. 6 *Toullier*, Nos. 18, 19. 6 *La. Reports*, 215. PORTER
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4. The plaintiff, by said contract, was not bound to deliver the freight, and we had no means of compelling him to comply with that part of the contract. Could he not, notwithstanding said stipulation, have given his freight to another boat? What was to prevent him? A bill of lading is a receipt; something must be received to give force thereto. In this case nothing was received, it was only a promise *in futuro*; and it must be reciprocal, on one side to take, and on the other to deliver, otherwise there is no contract.

5. The plaintiff's claim being for damages, resulting from an imputed neglect, it is in the nature of a *quasi delict*, and therefore the claim is barred by the prescription of one year. *La. Code*, art. 3501, 2294, 2295, 2296. 6 *Toullier*, No. 232. *Code Nap. art.* 1382, 1383.

6. The damages claimed, arising from a passive violation of a contract, the defendants are not responsible, unless they have been put in delay, according to law. *La. Code*, art. 1905, 1906, 1925, 1926, 1927. 6 *Toullier*, Nos. 238, 239, 240, 241, 244, 254.

7. In case the jury were of opinion, that damages are due, we contend, that there being no fraud imputed to the defendants, the damages ought to be the value of the molasses, at the place where it was purchased, and not at the place where it was to be delivered. *La. Code*, art. 1928. 6 *Toullier*, No. 289.

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The captain of a steam-boat, owned by several persons, (including the captain,) has authority to contract for freight, to be carried according to the usual trade of the boat; and all the owners are bound by such contract, even without their assent given thereto.

The captain as agent of a steam-boat, may make contracts to take effect *in futuro*, to carry freight according to the usual course of trade of said boat.

Where the captain of a steam-boat contracts to carry certain freight at a future day, between the well known *termini* of his voyage, and fails or violates such contract, the owners of the boat are liable in damages for all the loss sustained by the party with whom the contract is made.

The measure of damages and just criterion of loss to the owner, is the value of his property at the place of destination, after deducting freight.

Mathews, J., delivered the opinion of the court.

In this case the plaintiff sues the master and owners of the steam-boat Attakapas, to recover the value of a certain quantity of molasses, of which he was owner, and which he alleges was lost to him by the misconduct of said master, by acting in violation of, or neglect to comply with the conditions of a contract, by which the defendant Curry, promised and undertook to carry and convey said molasses from Attakapas to New-Orleans, for and on account of the owner. The cause was submitted to a jury in the court below, who found a verdict for the plaintiff, and assessed his damages to the sum of nine hundred eighty two dollars and fifteen cents, and judgment being thereon rendered, the defendants appealed.

The counsel for the appellants do not contest the liability of the master under the contract, and circumstances as proven in the case, but insist that the other owners are not legally bound by the agreement or contract made by him, as there is no evidence of their assent to it, and the captain of the boat did not act within the scope of his authorised powers as such.

The principal facts in relation to this contract, are as follow: the master of the boat who was also a part owner, being in New-Orleans, agreed with Fisher, Burke & Watson, the agents of the plaintiff, to transport empty barrels from the city to the plantation of Dubuclet & Benoit, situated on the Bayou Teche, in Attakapas, for the purpose of being filled with molasses, and when thus filled, to carry them back to New-Orleans, to be delivered to the factors of the plaintiff, &c.

The agreement thus to carry, was according to the usual trade of the boat; it is true, that there is no evidence which shows that the master was in the habit of making contracts to carry, to take effect *in futuro*. But we are unable to perceive any thing unreasonable or contrary to the usual course of trade, in which the boat was used in a contract, to transport produce at some future voyage between the well known *termini* of her voyages. We are of opinion, that the master had authority to make a contract, such as was entered into in the present instance, so as to bind the owners, and the

evidence is clear as to its violation and consequent loss of the molasses. But it is contended for the defendants, that the measure of damages assumed by the jury is erroneous. We think not ; the true and just criterion of loss to the owner, is the value of his property at the place of destination, deducting the cost of freight, and it cannot be pretended, that the verdict exceeds that value.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

M'DANIEL vs. INSALL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

A waiver of the right to have the evidence taken down by the clerk, is not a waiver of the right to have a statement of facts, so as to enable the party to prosecute an appeal.

Where there is not such a statement of facts, as the Code of Practice requires, and the evidence not sufficiently complete to enable the court to examine the case on its merits, yet, when justice requires it, the case will be remanded for a new trial.

This is an action to recover the value of a slave, hired by the plaintiff, to the defendant, and which the former alleges, was lost by the negligence and misconduct of the latter. The petition charges, that he hired a negro girl, about eighteen years of age, to the defendant for a year, that about nine months afterwards the girl became sick, of bilious fever, on the defendant's plantation, who neglected to have her properly attended to, or to send for a physician, or to give her any medicine, or notify the plaintiff of her condition, for about seven days, when she had continued to get worse daily, and

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sunk so low in disease, that it was impossible to save her. He charges the defendant with gross negligence in not calling in medical aid, and notifying him of her condition. He prays judgment for seven hundred dollars, as the value of said slave.

The defendant pleaded a denial; reserving his right to spread on the record afterwards, more fully, his matter of defence.

At the trial, the plaintiff obtained leave of the court, to amend his petition by adding two interrogatories, to be answered by the defendant, in open court, which was objected to, but no bill of exceptions taken.

1. Did not the plaintiff hire to you the negro woman mentioned in the petition? If yea, at what time, and for how long, and for what price?

2. Did not the said negro woman belong to the plaintiff, and had he not had possession of her for some time before he hired her to you?

The defendant refused to answer the interrogatories.

On the trial, the depositions of several witnesses, taken on interrogatories, propounded by the parties, were read. The testimony showed, that the defendant employed the slave on his plantation as a cook, and in the month of September, she was taken sick of a bilious fever, and was put in a cabin about one hundred yards from the dwelling house. The witnesses state they do not know how she was treated, but that the defendant, was not a cruel or bad master. One witness swears, that the defendant sent word by him to the plaintiff, that his negro was sick, which message, he delivered. It appeared that the slave was sick a few days before the defendant notified the plaintiff of it, and that she died four or five days after the plaintiff took her home, of bilious inflammatory fever.

The testimony of two witnesses, who testified orally, was not taken down by the clerk. The presiding judge took brief notes of their testimony, to enable him to charge the jury.

Singleton, one of the witnesses alluded to, states the girl took sick on Monday, and word was sent on Sunday follow-

ing, to the plaintiff; she kept about, worked some, but still complained, she cooked, washed and worked out. He bled her on Tuesday, by defendant's direction. Heard defendant tell the servants to ask her what she wanted. It was a sickly time. Defendant was at home all the time of her illness; paid little attention to his own slaves when sick. On Saturday she got worse. She was pregnant. On Sunday sent for Mr. O'Bannon to see her, and notified plaintiff, sent for no physician, and no medicine was given to her. He gave medicine to his own slaves when sick. He expressed a wish to send the slave home, but witness does not recollect on what day.

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The evidence further showed, that the plaintiff did not call a physician, for four or five days after he took the slave home. The doctor testifies, he was called in about ten hours before she died; when he first saw her, she was in a state of insensibility, her extremities cold.

The jury returned a verdict for the plaintiff, of three hundred dollars. The defendant's counsel moved for a new trial, on the ground, that the verdict was contrary to law and evidence.

The judge's charge to the jury, was in substance, that "if defendant's neglect was such, as to convince the jury, that it was the cause of her death, he is responsible; but not else."

The motion for a new trial was overruled, and judgment rendered in conformity to the verdict. The defendant appealed.

Lewis, for the plaintiff and appellee, moved to dismiss the appeal. 1. Because there is no statement of facts, or bill of exceptions in the record. 2. There is no certificate of the judge who tried the cause, nor of the clerk, *certifying* that *all* the evidence on which the cause was tried, is in the record. 3. Because the whole of the evidence on which the cause was submitted to the jury, was not taken down by the clerk, &c.

Linton, for defendant and appellant, at the same time, presented a petition, praying for a *mandamus* to the district

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judge, requiring him to show cause, why he will not make a statement of the evidence of John Singleton, a witness, examined in the trial of the cause, whose testimony was not taken down in writing by the clerk, &c.

The court ordered the *mandamus* to issue accordingly.

The district judge showed for cause, that he was unable to make any other statement of facts, of the testimony of said witness, further, than what was contained in his notes, taken on the trial, to aid him in charging the jury. That he cannot return his notes as a complete statement of facts, but annexes them to this answer. He further answers and says, that at the trial, the counsel for both parties, expressly waived their right, to have the testimony taken down by the clerk, from which, he inferred no statement of facts would be called for; that if he had had the slightest intimation that he would have been called on for a statement of facts, he would have had the testimony taken down by the clerk, or have taken full notes of it himself. He further says, that it was several days after the trial, when he was called on for the first time, for a statement of facts, when it was impossible for him to recollect the testimony given on the trial of the cause, except so far as contained in his notes; that he handed his notes to the defendant's counsel, telling him that it was the only statement of facts then in his power to make.

The clerk certified to all the other evidence, being in the record.

Lewis, for the plaintiff, moved to dismiss the appeal.

1. Because there is no statement of facts or certificate of the judge, as required by *Code of Practice*, art. 586. 4. *La. Reports*, 8. 3 *La. Reports*, 454, and authorities there cited.

2. Defendant by not causing *all* the testimony to be taken down in the court below, has lost his right to have the cause reviewed in the Supreme Court. *Code of Practice*, art. 601.

Linton, contra.

Bullard J., delivered the opinion of the court.

In this case, the appellant moved for a *mandamus* against the judge, before whom the trial was had, directing him to make a statement of facts, or to show cause why he does not. The judge in his return shows for cause, for not making a complete statement of facts, that at the trial, both parties expressly waived the right of having the evidence taken down by the clerk, and he concluded from that circumstance, that a statement of facts, would not be called for; that he cannot recollect the evidence, except so far as contained in his notes taken on the trial, which accompany the return; and which he says, were taken merely for his own satisfaction, and to enable him to charge the jury.

The attorney for the appellant, applied to the plaintiff's attorney, to agree with him on a statement of facts, in due time. It was declined and application made to the judge. A waiver of the right to have the evidence taken down by the clerk, is not, in our opinion, a waiver of the right to have a statement of facts, so as to enable the party to prosecute an appeal. The record does not furnish us such a statement of facts, as the Code of Practice requires, and the case cannot be examined in this court, on the merits. Justice requires, that it should be remanded for a new trial.

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A waiver of the right to have the evidence taken down by the clerk, is not a waiver of the right to have a statement of facts so as to enable the party to prosecute an appeal.

Where there is not such a statement of facts as the Code of Practice requires, and the evidence not sufficiently complete to enable the court to examine the case on its merits, yet, when justice requires it, the case will be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, the verdict set aside, and the case remanded for a new trial, and that the appellee pay the costs of the appeal.

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OF THE SIXTH PRESIDING.

On a mere matter of fact, submitted to a jury, when the evidence does not show the verdict to be clearly wrong, the verdict and judgment will not be disturbed.

This is an action of trespass, in which the plaintiff claims three hundred dollars, for damages sustained, by the defendant's cattle breaking into his fields, and destroying his fences and every thing in the fields; and for fifty dollars damages, as the price of a favorite dog, which he alleges, the defendant wantonly shot, while assisting in turning the defendant's cattle out of the fields.

The defendant excepted to answering to the merits, on account of vagueness and want of certainty in the allegations of the petition. On answering to the merits, he pleaded a general denial; and that no damages should be allowed, because the enclosures or fences were in bad condition, at the time the plaintiff complains of the trespass being committed, and not made in conformity to the rules and regulations of the parish.

The testimony consisted entirely of witnesses, whose statements were taken down by the clerk. The plaintiff showed by several witnesses, that his fence was about five feet high, surrounded on the outside by a ditch, and made of cypress *pieux*; that the defendant's cattle broke in repeatedly, by breaking and throwing down the posts and *pieux*. One witness says, the plaintiff repeatedly mended his fences, and that he was ultimately compelled, to abandon his field to the defendant's cattle. The field had all the gleanings in it, and witness would not have taken eighty dollars for his own field, which was smaller than plaintiff's; this was in the fall. It was proved, that the plaintiff's dog was killed by defendant,

but no specific value was proved, or damage sustained by his loss ; it was only said, he was a *good hunting dog*.

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Defendant's witnesses stated, that at the time of the damage complained of, the plaintiff's fences were in bad order, that they consisted of three or four *pieux*, the posts were tied with strings in many places, and in a wet time they gave way, and the *pieux* dropped down. The fence appeared to be a year or two in this fix.

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The jury returned a verdict for the defendant. The verdict was rendered on the 17th of May, 1833, and the judgment of the court thereon, was rendered and signed on the next day.

The plaintiff appealed.

1. *Neveu*, for the plaintiff, contended that the judgment and verdict should be reversed. The judgment was signed before the three judicial days elapsed, required by the Code of Practice.

2. The evidence clearly shows, that the plaintiff is entitled to damages.

Voorhies, contra, submitted the case for the defendant, on the following points :

1. This court has repeatedly decided, that it will not disturb the verdict of a jury, unless it appears to be clearly against the law and evidence.

2. No motion for a new trial having been made, the judgment and verdict must be confirmed.

Bullard, J., delivered the opinion of the court.

This is an action of trespass, in which the plaintiff claims remuneration, for damages done by the cattle of the defendant, breaking into his enclosures, and for killing his dog.

The defendant pleaded the general issue ; and that the plaintiff's fences were not such as are required by the police regulations of the parish. The jury found a verdict for the defendant, and the plaintiff appealed.

On a mere matter of fact submitted to a jury, when the evidence does not show the verdict to be clearly wrong, the verdict and judgment will not be disturbed.

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The whole matter, which was that of fact only, was left to the jury, and from the evidence in the record, we are not enabled to say, that the verdict was so clearly wrong, as to authorise the interference of this court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BABINEAU, CURATOR, &c. VS BENDY AND DUGAT.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

The law presumes certain formalities, which must be pursued in order to obtain a judgment of interdiction against a person above the age of majority.

The law presumes every person above the age of majority, capable of managing his own affairs; even deaf and dumb persons not excepted.

Where a person has not been interdicted, in pursuance of law; but being deaf and dumb, and a curator appointed to manage his affairs, such curator, cannot claim a legal mortgage on the real estate of another, who has intermeddled, and collected moneys due said deaf and dumb person.

This action was commenced by the plaintiff, as curator of Jean Babineau, alleged to be an interdicted person, against one Joseph Dugat, to render him liable for intermeddling with the estate of said Babineau, for the sum of two thousand dollars, with a legal mortgage, from the time of such intermeddling; and against W. Bendy, to subject a plantation purchased by him, from Dugat, since the above mortgage attached. The plaintiff alleges that Jean Babineau was deaf and dumb, from his nativity, and incapable of managing his affairs; that in January, 1819, one J. C. Guilbeau, was

regularly appointed a curator of said Babineau, who collected and received considerable sums inherited by the latter, and died in 1880, without rendering any account. That in 1821, Joseph Dugat, maternal uncle to the interdicted, then without any curator, took upon himself, without any authority, to administer his estate, and collected and received from the widow and heirs of Guilbeau, the former curator, about the sum of two thousand dollars, which he still retains: that in consequence of such interference, without authority, or any appointment, all his property from that date became legally mortgaged for the payment of all sums which may be found due by him. That since then, and in the year 1881, the said Dugat, sold a sugar plantation to one W. Bendy, which was, and is liable to said mortgage, in favor of said interdicted, and that said Dugat, has left this state, and is now absent therefrom: The plaintiff, further alleges, that he has been duly appointed curator, to the said Jean Babineau, and as such, fully authorized to administer his affairs: He prays that a curator *ad hoc*, be appointed to represent Dugat, and that he be duly cited, and that he have judgment against the said Dugat, for the sum of two thousand dollars, with a legal mortgage, on all the real property possessed and owned by him, since the year 1821, until final payment, and that the said Bendy, be cited to show cause, why the plantation, purchased by him, should not be seized and sold in payment of said claim.

The defendant, Bendy, pleaded a general denial; admitted the purchase of the plantation, from Dugat, now absent in Texas, for a valuable consideration, and who bound himself to warrant the title thereto: He prays, that a curator *ad hoc*, be appointed to represent and defend said Dugat, and that the plaintiff's demand be rejected.

But in case judgment should go against the land, he prays judgment against Dugat, annulling the sale and decreeing the re-payment of five hundred dollars, which he has advanced, and that his notes be given up and cancelled, &c.

The curator *ad hoc*, of Dugat, pleaded a general denial, &c.

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The evidence showed, that when the first curator of Jean Babineau died, in 1820, Dugat being the maternal uncle of the latter, took him to his house and acted as his curator, and administered his person and estate, without any legal appointment, from any court whatever; that he kept the said interdicted until he (Dugat) absconded from the state, in 1831. In 1821, Dugat made a settlement with the representatives of the late curator, and received the sum of two thousand dollars, on account of said Jean Babineau, which he never paid over, and still owes. The plaintiff also produced in evidence the act of sale from Dugat to Bendy, of the plantation claimed, made in 1831.

The court, after hearing all the evidence, gave judgment against Dugat for the sum of two thousand dollars, with legal interest from judicial demand, *without* recognising any legal mortgage on any of his property, and discharged Bendy from all liability, on account of the plantation.

The plaintiff appealed.

The only sentence of interdiction ever pronounced, appears to have been made in 1819, by a family meeting of the relations of said Jean Babineau, when he was twenty-eight years of age, before the parish judge of St. Martin, which is written in the French language. These proceedings were homologated, and Guilbeau was appointed curator to the interdicted. The judgment of homologation, is written in English. The evidence showed, that the only infirmity which the interdicted labored under, was want of hearing and speech, that he was deaf and dumb, from his nativity.

Simon, for the plaintiff.

1. Contended, that under the *art. 3283, of the La. Code*, there is a legal mortgage on the property of those who have intermeddled with the administration of property of interdicted persons. Dugat, without being legally appointed the curator of Jean Babineau, but having holden himself out as curator, duly appointed to the said individual, has received a sum of two thousand dollars, in the right of said Babineau, has now become subject to the consequences of his intermeddling.

2. A curator had formerly been appointed to Jean Babineau, as an interdicted person; the proceedings were had under the art. 409, of the *La. Code*, and said proceedings were sufficient to constitute the said Babineau, an *interdicted person*, in the legal sense of the term, therefore, the property sold by Dugat to Bendy, is subject to the legal mortgage of the interdicted.

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Lewis & Brownson, for the defendants.

1. Interdiction can only be pronounced by a judgment of the Probate Court. *Civil Code*, p. 78. art. 5-8. p. 80, art. 14, and *Code of Practice*.

2. There is no judgment interdicting Jean Babineau. The act set up as evidence of a judgment of interdiction, is a *nullity*, because it is written in *French*, and is not accompanied by any of the formalities required by law, in such cases; there is no petition, citation nor default taken. 1. *Martin's Digest*, 216. 1 *La. Reports*, 438.

3. No tacit mortgage can exist in this case, because *there was no person interdicted*. *Civil Code*, 456, art. 20.

4. No legal mortgage exists, except in cases *expressly* provided by law. *Civil Code*, 454, art. 16. *Arrêts de la Cour de Cassation*, vol. 26, p. 149, n. 46, du 27 Avril 1824, on articles 2121 and 2135 of *Code Napoléon*; which agree with our *Civil Code*, p. 454, art. 19.

5. No legal mortgage can exist in this case, against third persons, because the interdiction was not published as the law directs. *Civil Code*, p. 78, art. 11.

6. There is no record of the proceedings of interdiction in the parish where the land lies, to put third persons on their guard.

7. The parole testimony in the cause is not good against Bendy, for any purpose; a record of a judgment of interdiction by the proper tribunal, being the only legal evidence of that fact.

Mathews, J., delivered the opinion of the court.

In this case, Dugat, one of the defendants is sued as having intermeddled with, and taken on himself, the management of the person and estate of Jean Babineau, for whom the

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plaintiff acts as curator and alleging that he, the said Jean, is a person interdicted as incompetent to administer his own property, &c. in consequence of being deaf and dumb from his birth. The proceeding against the defendant, Bendy, has for its object, to subject certain property in his possession, as purchaser from Dugat, to a tacit or legal mortgage, which is claimed in favor of the interdicted person, on all Dugat's property. The court below, rendered judgment against the latter, for the amount of funds by him received on account of the interdicted, but decided against the claim of mortgage, on the property in the hands of Bendy, which had been purchased from Dugat. From this judgment, the plaintiff appealed.

The correctness of this judgment, in relation to Dugat, is not questioned, and the right of mortgage claimed, depends solely on the fact, whether the deaf and dumb person was legally interdicted.

The law presumes certain formalities which must be pursued in order to obtain a judgment of interdiction against a person above the age of majority.

The law presumes every person above the age of majority, capable of managing his own affairs, even deaf and dumb persons not excepted.

Where a person has not been interdicted in pursuance of law; but being deaf and dumb, and a curator appointed to manage his affairs, such curator cannot claim a legal mortgage on the real estate of another, who has intermeddled and collected moneys due said deaf and dumb person.

The evidence of the case, shows that he had, during his whole life, been considered as incapable of managing his estate or person, with ordinary judgment and discretion, in consequence of the want of hearing and speech; but no formal judgment of interdiction, seems ever to have been pronounced by any competent tribunal. It is true, that a curator was appointed to him, at a time when he was over the age of majority, and after the death of the person so appointed, Dugat, the maternal uncle of the individual presumed to be interdicted, assumed to act for him. The mortgage claimed on the property of the intermeddler, is one created by law, and must be confined to cases expressly provided for. The article of the old Code, relied on by the plaintiff, is found at page 456, and is expressed in the following words, "there is a legal mortgage on the property of those, who, without being tutors or curators, have taken on themselves, the administration of the property of minors, persons interdicted or absent, from the day when they did the first act of that administration."

The law prescribes certain formalities, which must be pursued, in order to obtain a judgment of interdiction against

any person who, from being of the age of majority, is presumed to be capable of managing his own affairs; and we know of no exception in relation to the deaf and dumb. The person in whose favor the mortgage is claimed, in the present instance, not having been interdicted in pursuance of the rules prescribed, is not one of those for whose benefit and protection the article of the Code cited provides. And according to the article 16, page, 454, of the same book, "there are no legal mortgages, but in the cases directed by law."

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, &c.

NIBLETT vs. WHITE'S HEIRS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where a person borrows the slave of another, to do certain work for him, and through his neglect, or imprudent conduct, the slave dies, he will be bound to pay his value to the owner.

So where A borrows the slave of B, to haul a load seven or eight miles, and a storm comes on, and the borrower refuses to stop and take shelter for himself and the slave, and the latter is lost, A will be answerable to B, in damages for the value of the slave.

This is an action for damages, against the widow and heirs of the late Joseph White, to recover the value of a negro boy, owned by the plaintiff, and alleged to have been lost by the negligence of the said White, while in his possession on loan.

The petition charges, that in the month of February, 1832, the plaintiff loaned a negro boy named Cesar, about sixteen years of age, to Joseph White, then living in the parish of Lafayette, who engaged, as he was bound by law, to take good care of said boy, and treat him well. That instead of doing

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so, he required the boy to work after night, in the cold and rain, at a very unusual hour, without using any precaution to protect him from the cold and inclemency of the weather, in consequence of which he died; he alleges the boy was worth eight hundred dollars, and that he has sustained damages resulting from his loss, of two hundred dollars more; that his widow and heirs have accepted his succession, and become liable for the amount of his said claim, for which the said White, by his negligence and misconduct, had rendered himself liable in his life-time. He prays judgment for the said sums amounting to one thousand dollars.

The defendants plead a general denial, except what is expressly admitted: They admit that Joseph White had permission of the plaintiff, to employ his boy on a Sunday, about the time mentioned in the petition, but that he took all proper care of said slave, which his situation and circumstances would permit, and that the boy was lost without any fault or negligence on the part of the deceased. They pray that the plaintiff's demand be rejected.

The testimony showed, that the plaintiff and White lived neighbors to each other, and were in the habit of borrowing and lending to each other. That on a Saturday, White was assisting the plaintiff with his oxen to move a house somewhere in the neighborhood; that White had some *pieux* near the place to which the house had been removed, told plaintiff it would be a good time for him to get his *pieux* home if the plaintiff would hire his negroes and oxen the next day, (Sunday,) to which the plaintiff assented on White's agreeing to pay the negroes for their Sunday work. It was seven or eight miles to White's house, to which the *pieux* had to be hauled, and they were late in the day getting at them. The weather which had been warm on Saturday, the day preceding, (the negroes being thinly clad,) suddenly changed and blew a storm of rain and sleet. The negroes and carts had a bad morass or *marais* to cross in their way; night came on, and by the time they got across the morass to a house, the negro boy in question, was frozen to death.

The plaintiff's testimony further showed, that it was one or two o'clock at night, when White came home, nearly perished with cold, and told his wife, he wished he had never seen the *pieux*; that one of the plaintiff's negroes was dead, and he expected he would have him to pay for.

The district judge was of opinion, the defendant's were responsible for the value of the slave lost, gave judgment accordingly for six hundred dollars, and costs of suit. The defendants appealed.

Brownson, for the plaintiff.

Garland, for the defendants.

Martin, J., delivered the opinion of the court.

The plaintiff claims the value of one of his slaves, which he lent to White, and who through the gross neglect and ill conduct of White, was compelled to travel, during a great part of the night, while a very uncommon storm raged, although very thinly clad, so that he suffered so much through fatigue and the inclemency of the weather, that he died.

The defendants denied the ill usage and misconduct attributed to him.

There was a judgment for the plaintiff, and the defendants appealed.

No question of law arises in this case which turns entirely on matters of fact. We have carefully examined the testimony, and are unable to conclude that the district judge erred. It appears the deceased was warned by a person near whose house he passed, of the danger of pursuing his journey during the storm, and the offer was made to him of a shelter for himself and the negroes who were with him; but he persisted in continuing to travel.

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Where a person borrows the slave of another to do certain work for him, and through his neglect or imprudent conduct, the slave dies, he will be bound to pay his value to the owner.

So where A borrows the slave of B, to haul a load seven or eight miles, and a storm comes on, and the borrower refuses to stop and take shelter for himself or the slave, and the latter is lost, A will be answerable to B, in damages for the value of the slave.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

WESTERN DIST.

September, 1894.D'ARBY'S HEIRS

VS.

BLANCHET'SHEIRS.

D'ARBY'S HEIRS VS. BLANCHET'S HEIRS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
OF THE SIXTH PRESIDING.

The principle, that possession of a part of a tract of land, is possession of the whole, and sufficient to prevent the adverse party from acquiring absolute title by prescription, cannot prevail over the adverse possession of the other party, under a title of higher dignity, and a definite location by authority of the sovereign.

Where land has been possessed, even under an erroneous location, for more than thirty years in conformity to it, in the presence of the adverse claimant, the plea of prescription will prevail, and the possessors quieted in their possession and title.

The plaintiffs sue, as the testamentary heirs of Pierre D'Arby, f. m. c., deceased, late a resident of New-Orleans, to recover from the defendants, who are the heirs and legal representatives of Olivier Blanchet and wife, both deceased, a tract of land, fifteen arpents on one side, and fourteen on the other side of the river Vermilion, with the depth of forty, being the largest portion of an original tract, of twenty arpents front on each side of the Vermilion, with the depth of forty, granted by the Spanish government, finally to the plaintiffs' ancestor, by order of survey, signed by governor Galvez, the 22d of March, 1791. The plaintiffs allege, that the defendants are in possession of the land, and refuse to give it up: they pray that it be decreed to belong to them, and that they be quieted in the possession thereof.

The defendants claim the land, under a complete legal title, derived from the plaintiffs. They allege that the plaintiffs sold eleven and one-half arpents, being all of the remaining tract of land, claimed by them in their petition, to one Pierre Dubois, by public act, dated May 8th, 1817, being six arpents on the right, and five and one-half arpents on the left side of the Vermilion; and as the parties were uncertain as to the number of arpents, then belonging to the vendors, agreed, that if there should be a greater quantity than was

specified in the act of sale, the purchaser was to take the surplus, at twenty-five dollars per arpent, &c. They further allege, that at the sale of the succession of said Pierre Dubois, the 9th June, 1823, Madame Olivier Blanchet purchased seven and one-half arpents on the east side, and six arpents on the west side of the Vermilion, of said land, in two lots, all of which were sold with warranty; that by said sale to Dubois, the plaintiffs abandoned all pretensions to the land claimed by them, reserving only the right of twenty-five dollars, for the surplus arpents, as above stated. They further state, that their ancestor, Olivier Blanchet, purchased four arpents on each side of the Vermilion, adjoining the above lands of Dubois, from Jean Broussard, by act bearing date the 28th of May, 1813, and situated within the limits now claimed by the plaintiffs.

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The defendants plead a general denial; and allege uninterrupted possession of the premises in themselves, and those under whom they claim of thirty years; and a possession of ten and twenty years, in virtue of a good and legal title; they plead the prescription of ten, twenty, and thirty years, and call their vendors in warranty.

The heirs of Dubois, called in warranty, admit the purchase of the lots, amounting to six arpents front on one side, and seven and one-half on the other side of the Vermilion, at the sale of the succession of their ancestor, but with no privilege for the surplus; that they are entitled to the surplus, on paying the plaintiffs twenty-five dollars for each surplus arpent, front; and that the plaintiffs have a good title to all of the land claimed by them, except the eleven and one-half arpents, sold to these respondents; and by them to the defendants, as before stated; and the surplus of the original tract, will be the property of Pierre Dubois, on the payment of twenty-five dollars for each surplus front arpent; wherefore they join the plaintiffs in their claim thereto, and support their title; and they intervene for this purpose.

After hearing all the evidence, and inspecting the plats and diagrams of the survey made of the land, the district

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judge gave judgment in favor of the plaintiffs, for the land claimed by them, with a condition that the heirs of Dubois, called in warranty, and who have intervened, take the benefit of the judgment, on their paying the plaintiffs twenty-five dollars for each front arpent, within ninety days from the date of said judgment. The defendants appealed.

The titles of the respective parties are set out and stated in the opinion of the court.

Simon, for the plaintiffs, and for the intervenors.

1. The order of survey in favor of *Maison*, is dated the 26th February, 1778, and is the oldest title. The same land was afterwards conceded to *D'Arby*, commencing at the point of *Maison's*, and running according to his boundaries; the act of concession, bearing date 22d March, 1791.

2. *Hebert's* ten arpents are bounded on one side by *Maison*, and on the other by the domain, and the title dates from the 23d June, 1781, (three years after the date of *Maison's* title, in whose right the plaintiffs claim.) *Claude Broussard* bounds on one side by *Charles Hebert*; and *Pierre Guilhard* is bounded on one side by *Claude Broussard*, and both claim under titles dated 23d June 1781.

3. All the foregoing claims are confirmed, according to the boundaries, fixed in their respective titles. The plaintiffs have possessed a part of the land under these titles. Actual possession of a part, with title to the whole, is possession of the whole. 9 *Martin*, 43.

4. There has been error in the location of these titles, but no conflict in the titles themselves; the defendants have no adverse title to that of the plaintiffs, and never intended to possess the land of the plaintiffs.

5. The boundary of *Melançon*, for whose land *Maison's* title calls, having been ascertained, the several tracts must be located according to the boundaries pointed out by the government; the grantees have no right to encroach upon each other's land, but must follow the calls of their respective titles. This case is in principle, the same as those reported in 1 *Martin*, N. S. 456. 3 *Ibid*. 11.

Brownson, for the defendants.

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Bullard, J., delivered the opinion of the court.

This is a petitory action, by which the plaintiffs, as heirs of Simon D'Arby, seek to recover a part of a tract of land, of twenty arpents front on both sides of the Vermilion, by a depth of forty. The title exhibited by them, is an order of survey, dated in 1791, in favor of their ancestor, confirmed by commissioners certificate. This document recites, that the same land has been previously conceded to one Maison, in 1778, and by him abandoned to the domain, never having been cultivated by him. It calls to be bounded on one side by Melançon, and on the other by the domain. The commandant of the post of Attakapas, certifies that this tract had been surveyed for Maison, and two land-marks (corners) planted in presence of Melançon, but no plat of survey accompanies his certificate.

The defendants set up title under three patents, in favor of Charles Hebert, Claude Broussard and Pierre Gaillard, severally, for ten arpents front on both sides of the Vermilion; the first calling to be bounded on one side by Maison, and on the other by the domain, dated June 23d, 1788; the second calls for the first, and the third for the second, both the latter being dated June 23d, 1781.

The defendants further plead the prescription of ten years.

It appears, that as early as the year 1800, by various exchanges and other alienations, these three grants had become the property of Gaillard, the immediate vendor of the defendants' ancestor. On the sixth of June, of that year, Gonsoulin, a Spanish surveyor, made a survey, and gave a location to them, according to which the defendants claim to hold them. On this plat of survey, the upper grant, that of Hebert, is represented as bounded by Maison or D'Arby on the upper side, according to the calls of the patent. The evidence shows, that the land has been holden from that period to this, in conformity to that survey.

But it is contended, on the part of the plaintiffs, that this was evidently an erroneous location, inasmuch as it did not

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leave land enough for the claim of Maison, between the upper line, as established by Gonsoulin, and the lower line of Melançon; and that Maison had been previously put in possession, by metes and bounds. The original location of the Maison tract, is not shown by evidence before us, and admitting that this location by Gonsoulin was erroneous, still the land has been possessed for more than thirty years, in conformity to it, in presence of the adverse claimant.

It is, however, contended, that the principle settled by this court, in the case of Broussard *vs.* Duhamel, (3 *Martin*, N. S. 10,) is applicable to this, and that the plea of prescription cannot avail the defendants, inasmuch as all these titles were derived from the same source, and call to be bounded by each other, and no location is shown, which relates to all of them; that D'Arby possessed at least a part of his grant, and that possession of a part is possession of the whole, according to his title. It does not appear to the court, that the case cited is analogous to this. In that case, several purchasers hold under the same primitive title, having bought at the same time, different portions of it, and no regular survey had been made, designating the portion purchased by each. The court held, that an erroneous survey, made of some of the portions, was not such a partition as would enable one of them, who possessed in error, to avail himself of the ten years prescription. In the case now under consideration, the parties hold by distinct titles, derived immediately from the sovereign, and one of them shows a location by public authority, apparently correct. The principle contended for, by the plaintiffs' counsel, that a possession of a part of his land is a possession of the whole, cannot prevail over the adverse possession of the defendants, under a title of even higher dignity, and a definite location, by the authority of the sovereign.

The principle that possession of a part of a tract of land, is possession of the whole, and sufficient to prevent the adverse party from acquiring absolute title by prescription, cannot prevail over the adverse possession of the other party, under a title of higher dignity, and a definite location by authority of the sovereign.

The evidence shows, that an oak tree near the Bayou, was established as a land-mark by Gonsoulin, and has been recognised as the division line, between Herbert's patent and the land of D'Arby, and that the other titles below, on the Bayou, conform to that survey. Gaillard's house is shown to

have been near that tree. One of the witnesses was on the spot, shortly after the survey by Gonsoulin, and is confident that the oak tree is the boundary. In addition to this, it is shown, that D'Arby sold a part of his tract to Dubois, and in his sale it is described, as bounded on one side by Blanchet. At that time the defendants held, and actually occupied their land, as they do at this time, and at the sale of Dubois's estate, the defendants themselves purchased a part of the same land, adjoining them.

Upon the whole, after the best attention we have been able to give to this case, we are satisfied, that the evidence sustains the plea, of prescription, and that the defendants ought to be quieted in their possession and title.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the defendants be quieted in their possession of the land claimed by them, according to the survey made by Gonsoulin, and that the plaintiffs pay the costs of both courts.

Where land has been possessed, even under an erroneous location, for more than thirty years, in conformity to it, in the presence of the adverse claimant, the plea of prescription will prevail, and the possessors quieted in their possession and title.

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BARCLAY vs. CONRAD ET ALs.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Where the defendants purchased a sugar mill of the plaintiff, who is a merchant, part of which broke in pieces, on being put up, the latter is not responsible for the defects, unless he knew it was of bad quality, and represented it as good.

The defendant cannot set up redhibitory defects to the thing sold, and purchased by him, when sued for the price, after having sold it to another. By selling it, he affirms the first contract.

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Where a merchant sells a sugar mill, which proves defective, after being received and put up by the purchaser, he is still entitled to recover the price, unless there was some concealed defect, or he had represented it as sound, when not so.

A workman engages to furnish good work; but a merchant is not so bound.

This is an action instituted by the plaintiff, residing in Louisville, Kentucky, to recover of the defendants, one thousand dollars, the price of a sugar mill, delivered at their sugar plantation, in Attakapas.

He charges, that the price of said mill was one thousand dollars, and that he proposed to one of the defendants, if they were dissatisfied with it, he would take it back, which was refused; that they have since sold said mill, for the sum of twelve hundred dollars. He prays judgment for one thousand dollars, the price at which he sold it.

The defendants admit, that in consequence of a previous contract, the plaintiff delivered a sugar mill at Franklin, in Attakapas, in the fall of 1829, which they had conveyed to their plantation, and put up, and managed by a skilful mechanic, for the purpose of grinding their crop of cane; that notwithstanding all their care and skill, when they began to grind, the mill broke in pieces, in consequence of the defective materials, and manner in which it was made; that they had to throw it away as worthless, and put up a wooden mill. In consequence of the lateness of the season, occasioned by the defective quality of the mill, purchased of the plaintiff, they estimate a loss in their crop of sugar, of four thousand dollars, which added to the mechanic's bill of four hundred dollars, and freight of forty more, makes a sum total of their losses, amounting to four thousand four hundred and forty dollars, for which, after rejecting his demand, they pray judgment against the plaintiff, in reconvention.

The defendants, amending their answer, add the allegation of fraud, and charge the plaintiff with acting illegally and fraudulently, in knowingly selling them the defective sugar mill, in consequence of which, they sustained the damages claimed in the reconventional demand.

The defendants took the depositions of several witnesses, who testified to the breaking of the mill, after it was put up. Among these witnesses was the mechanic, who put up the mill. He states, it was the first horizontal mill he had ever put up, but thinks he understood his business well enough, to put the mill up in the right manner. The bevel wheel broke soon after they began to grind, and the defendants had to procure a wooden mill, to make up their crop. One witness estimates the loss of the defendants, to be half their crop, in consequence of the breaking of the mill. He also states, that they sold the broken mill for one thousand two hundred dollars.

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The plaintiff's testimony showed, there was great difficulty in putting up horizontal mills, by the best of workmen ; that they all break more or less. The same evidence showed that the defendants sold this mill for one thousand two hundred dollars, after getting a new wheel. It was also shown, the plaintiff's regular business was that of a merchant, and vending machinery of this kind.

The jury returned a verdict for the plaintiff, for the sum claimed. After an unsuccessful attempt to obtain a new trial, the defendants appealed.

The district judge charged the jury on the trial, "that it was admitted, the defendants bought the mill, and must pay for it. If the mill broke from its being badly mounted, it was no fault of the plaintiff, and he is not responsible. If the mill be of bad quality, did plaintiff know it, and represent it as good ? If he did, he is answerable for all damages sustained by the failure of the mill ; if not, he is not responsible. That as to redhibition, the thing must be restored ; if the purchaser has sold it he thereby affirms the contract and must pay for it. The law cited from *Pothier*, that a workman engages to furnish good work, does not apply ; the plaintiff is a merchant, and is not so bound. Nor is there here any violation of contract, by plaintiff ; he did not warrant the mill as sound, and unless it had some concealed defect, and he represented it as sound, he is not liable." To which charge the defendants' counsel excepted, as being

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contrary to law. He also required the judge to charge the jury, "that under the article 1928 of the La. Code, the plaintiff being bound, to warrant the soundness of the mill by him sold, he is liable for such damages as were contemplated at the time of the contract," &c., which the judge refused, and a bill of exceptions taken.

This case was submitted to the court without argument, by *Mr. Brownson* for the plaintiff, and by *Mr. Simon* for the defendants.

Martin J., delivered the opinion of the court.

The plaintiff claims the price of a sugar mill, sold and delivered to the defendants.

They admit the delivery, but charge the plaintiff with fraud, averring that he knew the mill was inartificially constructed, and made of so bad materials that it was absolutely worthless; and being put up by the defendants, immediately after they received it, several parts of it broke off, as soon as it was put in motion; that they were unable to make use of it, after they were at considerable expense and charges, in putting it up, and endeavoring to avail themselves of it. They further aver, that they sustained heavy losses, in consequence of the disappointment, and their inability to use it, and the consequent impossibility of grinding their cane crop.

Where the defendants purchased a sugar mill of the plaintiff, who is a merchant, part of which broke in pieces on being put up, the latter is not responsible for the defects, unless he knew it was of bad quality and represented it as good.

The defendant cannot set up rehibitory defects, to the thing sold and purchased by him, when sued for the price, after having sold it to another. By selling it, he affirms the first contract.

A workman engages to furnish good work, but a merchant is not so bound.

There was a verdict and judgment for the plaintiff; and the defendants appealed, after an unsuccessful effort to obtain a new trial.

Our attention is drawn to the charge of the court, who told the jury, "it was admitted that the defendants bought the mill, and consequently they must pay for it; that if the mill broke, in consequence of being badly mounted, it was no fault of the plaintiff, and he was not answerable. If the mill was of a bad quality, did the plaintiff know it, and represent it as good? If he did, he is answerable for all the damages sustained by the failure of the mill. If he did not, he is not responsible. As to redhibition, the thing must be restored. If the purchaser has sold it, he has affirmed the contract.

By the law cited from *Pothier*, a workman engages to furnish good work ; the plaintiff is a merchant, and is not so bound. Nor is there here any violation of contract, unless there had been some concealed defect, and the plaintiff had misrepresented it as sound."

It does not appear to us, that the charge of the court was erroneous. On the merits, the evidence shows, that the mill was sold by the defendants, for one thousand two hundred dollars, while they had bought it for one thousand dollars.

The jury have been of opinion, that the defendants have not supported their defence. On an appeal to the judge, by a motion for a new trial, he has been of opinion, that they have not erred.

Our best attention to the statement of facts, has led us to the conclusion, that it is not our duty to interfere.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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COON
VS.
BRASHEAR ET AL.

Where a merchant sells a sugar mill which proves defective after being received and put up by the purchaser, he is still entitled to recover the price, unless there was some concealed defect, or he had represented it as sound when not so.

A workman engages to furnish good work; but a merchant is not so bound.

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APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Prescription when once acquired, may be either tacitly or expressly renounced.

When a party once voluntarily renounces prescription in his favor, in the course of the trial in the inferior court, he cannot renew it, or avail himself of it in the Supreme Court.

The voluntary waiver of the plea of prescription, by a party in a judicial proceeding, especially when accompanied by a concession, on the part of his adversary, made in consequence thereof, is the strongest presumption of the renunciation of the right itself.

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ET ALA.

Where a workman sues to recover his wages, at a stipulated hire, per month, as a brick-layer, and evidence is introduced without objection, to prove the usual wages of that class of mechanics, the jury are the judges of the value of the work charged as having been done, on the evidence then before them.

In a suit to recover wages, at a stipulated hire per month, by a mechanic it is sufficient for him to prove his contract, and the length of time he was in the defendant's employment.

Where a witness swears falsely, on a material point, in a cause, the jury is authorised to disregard his testimony altogether.

The jury are the judges, whether a misstatement by a witness was wilful, or material, and what degree of credit ought to be given to his testimony.

The Supreme Court can judge only of the effect of the whole evidence of the case taken together, and whether the verdict of the jury is manifestly against, or without legal evidence. This is the principle uniformly adhered to, and when the verdict is not of this character, it will not be disturbed.

The exception or plea, that no amicable demand was made, must be specially pleaded, and in *limine litis*. It is too late to put in the exception after *contestatio litis*.

This is an action, for work and labor done as a mechanic, at a stipulated hire per month, in which the plaintiff claims from the defendants the sum of two thousand one hundred and twenty six dollars. He charges, that he made an agreement to work for the plaintiffs as a mechanic, at their sugar farm in Attakapas, at forty dollars per month, from the middle of February 1828, until the middle of July following; and that after that period, and up to the 7th of February, 1832, as an inducement for him to continue, the defendant raised his wages to forty-five dollars per month, until the whole amount of his wages amounted to two thousand one hundred and twenty-six dollars. He prays judgment for this sum, with legal interest from judicial demand.

The defendant pleaded a general denial; admitted the plaintiff had been in the habit of working for him, more or less, in the period alleged, but not in the manner set forth in the petition. That at one time, he worked by the month and

then by the day, as appears by a memorandum of account handed by him to the defendants, which he stated to be his whole account, up to the time when he left their employment. They annex an account for moneys and merchandise advanced, drafts and physicians' bills, paid at various times, when he was sick and unable to work, and for boarding and lodging while sick, amounting to one thousand and seventy dollars and sixty one cents, which they plead in compensation.

At the commencement of the trial, the defendants pleaded the want of an amicable demand.

After the trial had progressed, the defendants withdrew their plea of prescription, which had been previously filed, and the plaintiff withdrew his objections to the signature to a certain paper, purporting to have been signed by him.

On the trial the plaintiff offered several witnesses to prove the time he worked for the defendants, and his agreement with them. The defendants offered in evidence, several account books, receipts and accounts of plaintiff, and orders which had been paid by them; and the testimony of several witnesses to prove, that the plaintiff was frequently sick, from imprudence and other causes, and lost much time. The counsel for defendants, moved the judge to charge the jury, "that they were not the judges of what was the value of the services of the plaintiff, as a brick-layer, *per day*, but that the plaintiff was bound to prove to them, by evidence offered before them," which the judge declined, but told the jury, "they were the judges of the value of the work on the evidence before them;" to which *refusal* and *charge*, the defendants took a bill of exceptions.

The jury on examining and hearing the whole case, returned a verdict for a balance due the plaintiff of three hundred and sixty seven dollars. Judgment was rendered in conformity therewith, except as to costs, which decreed that the plaintiff pay costs up to the time of filing the defendants' answer, and that the latter, pay all subsequent costs.

The defendants appealed. In answer to the appeal the plaintiff and appellee prayed, that the judgment be corrected, so far as to condemn the defendant to pay *all* the costs.

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COOK
VS.
BRASHBAE
ET ALA.

WESTERN DIST.
September, 1834.

COOK
VS.
BRASHEAR
ET ALA.

Lewis and Brownson, for the plaintiff and appellee.

1. The want of an amicable demand, is an exception, that must be pleaded in *limine litis*, and in this case came too late. 4 *La. Reports*, 105.

2. Defendants' plea of prescription, in the Supreme Court, cannot be received, because the same plea was put in below, and afterwards *specialty waived*.

Wharton, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff sues to recover his wages as a mechanic, in the employment of the defendants, for a period of several years, a part of the time at the rate of forty dollars per month, and a part at forty-five. The answer admits, that the plaintiff had been in the habit of working for the defendants, but not at the rates of wages stated by him; compensation, as to a part of the demand, was also pleaded, and prescription. After this answer to the merits, the defendants further pleaded, the want of an amicable demand.

During the trial, the plea of prescription was voluntarily withdrawn, by the defendants, simultaneously with certain concessions made by the other party, as to a disputed point of evidence in the cause. In this court, the appellants have renewed that plea. This is opposed by the appellee who urges that the waiver of the plea in the District Court, is tantamount to a renunciation of prescription, which can validly be done after it is acquired, and that the renunciation cannot be retracted.

Prescription, when once acquired, may be either tacitly or expressly renounced.

When a party once voluntarily renounces prescription in his favor, in the course of the trial in the inferior court, he cannot renew it, or avail himself of it, in the Supreme Court.

The Code has established the principle, that prescription when once acquired, may be validly renounced. The renunciation is either express or tacit: "a tacit renunciation results from a fact, which gives a prescription of the relinquishment of the right acquired by prescription." *Article 3424*. As it is only by way of exception or plea, that a party can avail himself of prescription, it seems to us that the voluntary waiver of such exception in the course of a judicial pro-

ceeding, more especially, when accompanied by a concession on the part of the adversary, is such a fact, as furnishes the strongest presumption of an intention to renounce the right itself. Indeed it is difficult to distinguish between, in this case, a waiver of the exception, and a renunciation of the right, or to understand how the end is to be attained, after a voluntary abandonment of the means. We are therefore of opinion, that the plea cannot be renewed, in this court, so as to avail the defendants.

A bill of exceptions was taken to the charge of the judge to the jury, which is relied on by the appellant. His counsel moved the court to instruct the jury, that they were not the judges of what was the value of the plaintiff's services, as brick-layer, per day, but that the plaintiff was bound to prove it to them, by evidence offered before them; but the judge instructed the jury that they were the judges of the value of the work, on the evidence before them. It is true, the plaintiff sued for wages, at a stipulated hire, and the question was, not what his services were really worth, but evidence had gone to the jury without exception, to prove the usual wages of that class of mechanics, and we think the judge did not err, in giving such a charge to the jury. He was clearly correct in refusing to give the charge asked by the defendants' counsel, to wit: that the plaintiff was bound to prove, the value of his services. It was enough for him to prove his contract, and the length of time he was in the defendants' employment.

On the merits, it has been urged, that the verdict of the jury was contrary to, and without legal evidence. It has been particularly insisted, that the jury was bound to disregard the testimony of one of the principal witnesses, on the ground, that he had stated what was clearly proved to be false, and the counsel relies on the rule of evidence, as stated by Starkie and other writers on that branch of the law, "*falsum in uno, falsum in omnibus.*" 1 Starkie, 524.

It is true, that when a witness has wilfully perjured himself, on a point material to the cause, the jury is authorised to disregard his testimony altogether. But the jury is to judge

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VS.
BRASHMAN
ET ALA.

The voluntary waiver of the plea of prescription by a party in a judicial proceeding, especially when accompanied by a concession on the part of his adversary made in consequence thereof, is the strongest presumption of the renunciation of the right itself.

Where a workman sues to recover his wages at a stipulated hire per month, as a bricklayer, and evidence is introduced without objection to prove the usual wages of that class of mechanics, the jury are the judges of the value of the work charged as having been done, on the evidence then before them.

In a suit to recover wages at a stipulated hire per month by a mechanic, it is sufficient for him to prove his contract and the length of time he was in the defendant's employment.

Where a witness swears falsely on a material point in a cause, the jury is authorised to disregard his testimony altogether.

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COON
VS.
BRAKNER
ET ALA.

The jury are the judges whether a misstatement by a witness was wilful or material, and what degree of credit ought to be given to his testimony.

The Supreme Court can judge only of the effect of the whole evidence of the case taken together, and whether the verdict of the jury is manifestly against or without legal evidence. This is the principle uniformly adhered to, and when the verdict is not of this character, it will not be disturbed.

The exception or plea that no amicable demand was made, must be specially pleaded and in *limine litis*. It is too late to put in the exception after *contestatio litis*.

whether the misstatement was wilful or material, and what degree of credit ought to be given to the witness. It is difficult to establish any technical rule on this subject. In the case now under consideration, it may have appeared to the jury, as it does to us, quite immaterial, whether the plaintiff put up two buildings or one, inasmuch as his demand was for services by the month, and not for the price of a particular job. It could not be supposed that the witness would wilfully perjure himself on a point of fact, which was wholly irrelevant to the issue, and could not avail the plaintiff. This court cannot control juries, as to the credit due to the statements of particular witnesses; we can judge only, of the effect of the whole evidence taken together, and whether verdicts rendered by them, are manifestly against, or without legal evidence. This is the principle to which we uniformly adhere, and which, in this case, does not authorize us to disturb the verdict of the jury.

The appellee in his answer, alleges that there is error in the judgment to his prejudice, which he prays may be corrected. It appears that after the answer to the merits, and on the eve of the trial, the defendants pleaded the want of amicable demand, and such demand not having been proved, the plaintiff was adjudged to the payment of costs, up to the time the answer was filed. We think the court erred in this particular. This court has already decided, that such exception should be specially pleaded, and in *limine litis*. It was too late to put in the exception after the *contestatio litis*. 1 *La. Reports*, 105.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that the plaintiff and appellee recover of the defendants, the sum of three hundred and sixty-seven dollars, with costs in both courts.

M'INTIRE vs. WHITING.

WESTERN DIST.
September, 1834.APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.M'INTIRE
vs.
WHITING.

The ceding debtor, after surrender and appointment of syndics, has no longer any capacity to appear in court, in relation to the property surrendered.

But where a ceding debtor has a qualified property in goods, acquired after the surrender as bailee or carrier, which are seized by a judgment creditor, he has a right to move the court and have the writ and seizure annulled and set aside.

Property belonging to the ceding debtor at the time of the surrender, cannot be seized in execution by a judgment creditor, who was a party to the *concurso*.

The District Court on motion, by an insolvent debtor, has the right to quash an execution, which improvidently issued, contrary to the order staying proceedings; the debtor, although incapable of appearing in court, in relation to the mass of the property surrendered, was a party to the original suit, and might well make such a motion.

This action commenced by a written motion of the defendant, to annul and set aside a levy and seizure made under a writ of *feri facias*, which issued on a judgment of the plaintiff against the defendant, after the latter had made a cession of his goods.

The judgment upon which the *feri facias* issued, was recorded in October, 1832, in the parish of St. Mary. The defendant is a resident of Texas, but was, at the time of recording the judgment against him, a partner in the commercial firm of George Whiting & Co., in a store, which had been carried on several years in the town of Franklin, in said Parish. On the 22d October, 1833, the firm of George Whiting & Co., filed their *bilan*, upon which the plaintiff's judgment was placed, as one of the debts owing by the firm. The surrender was accepted by the judge, and a meeting of the creditors ordered. The attorney of the plaintiff appeared before the notary, and swore that the amount of the said judgment was due to the plaintiff by the firm.

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In April 1834, the plaintiff caused execution to issue on said judgment, which was levied on sundry articles in possession of the defendant, but which he alleges are not his property. He presented a written motion, by way of petition, to the District Court of St. Mary, in which he alleges the seizure is illegal on several grounds, viz: that he is not the owner of the articles seized; "and that no legal or judicial process can be had on the said judgment against his person or property, nor against any property in his possession." He prays that the seizure be annulled and set aside, and that a forthcoming bond in the sum of three hundred dollars, which he gave for a portion of the articles seized, be cancelled. The district judge gave judgment accordingly, from which the plaintiff appealed.

Splane, for the plaintiff and appellant.

Brownson, contra.

Bullard J., delivered the opinion of the court.

The commercial firm of which the appellee was a member, having made a surrender for the benefit of their creditors, and obtained a stay of proceedings, the appellant or judgment creditor caused an execution to issue against one of the ceding debtors. M'Intire, the appellant had appeared at the meeting of the creditors, and a syndic had been appointed. Samuel Whiting, one of the firm represented in writing to the court from which the execution issued, that the sheriff, in virtue of said execution, had seized certain property in his possession, but not belonging to him, which had been sent by Mr. H. Whiting, as a present to his wife and family residing in Texas, and of which goods he was only bailee or carrier. He therefore moved the court to quash the writ, and to order the bond given to the sheriff for the forthcoming of the property to be cancelled. It was accordingly done, and M'Intire appealed.

The ceding debtor, after surrender and appointment of syndics, has no longer any capacity to appear in court in relation to the property surrendered.

His counsel contends that he had a right to levy his execution on property acquired by the ceding debtor, after his

surrender, and that the syndic alone has a right to inquire into the regularity of the proceeding in this case.

It is true the future acquisitions of a ceding debtor, coming to better fortune, may be applied to the payment of his debts, unless a release has been given, but it by no means follows that execution may issue in the first instance, on the demand of a judgment creditor. The ceding debtor after the surrender has been accepted, and a syndic appointed, has no longer any capacity to appear in court, in relation to the property surrendered, and if the execution in the present case had been levied on property belonging to the firm, or either of the partners, we should concur in opinion with the counsel for the appellant, that the appellee had no right to interfere, and ought not to have been listened to. The evidence does not show to whom the property seized really belonged. If we take the allegations of the plaintiff as true, he had only a qualified property in the goods acquired after the surrender, and in that case he had a right to interfere. It was a matter which did not regard the mass of the creditors. If on the other hand, the property belonged to the ceding debtor at the time of the surrender, the judgment creditor, who was a party to the *concurso*, had clearly no right to proceed by execution. On either supposition, the proceeding was irregular.

But it is further contended, that the court erred in quashing the writ and cancelling the bond on motion, that it could only be done by injunction regularly obtained, and prosecuted. We think the court had a right to quash the execution, which improvidently issued, contrary to the order staying proceedings, and as the appellee was a party to the original suit, he might well make that motion, although, without capacity to act in relation to the mass of property surrendered. The bond in question was but an accessory, and necessarily ceased to have any legal effect as soon as the execution was set aside.

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WATKIN DIST.
OF
WATKIN.

But where a ceding debtor has a qualified property in goods, acquired after the surrender as bailee or carrier, which are seized by a judgment creditor, he has a right to move the court, and have the writ and seizure annulled and set aside.

Property belonging to the ceding debtor at the time of the surrender, cannot be seized in execution by a judgment creditor who was a party to the *concurso*.

The District Court, on motion, by an insolvent debtor, has the right to quash an execution which improvidently issued contrary to the order staying proceedings. The debtor, although incapable of appearing in court in relation to the mass of the property surrendered, was a party to the original suit, and might well make such a motion.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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September, 1834.

DAVIS'S HEIRS
vs.
PREVOST'S HEIRS.

DAVIS'S HEIRS vs. PREVOST'S HEIRS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

In this case the following principle is settled and decided.
6 *Martin*, N. S. 265.

In a petitory action, where the defendants, their vendors and warrantors pleaded, 1st. The general issue; 2d. Prescription, by thirty years uninterrupted possession; 3d. Prescription, by more than ten years possession under a *just title and in good faith*; 4th. Silence of the plaintiffs for more than forty years in not asserting their title; and in support of these pleas, offered the *testimony of witnesses* to prove and make complete their chain of title, which was objected to by the plaintiffs; 1st. Because the defendants having admitted in their pleadings, that they had a written title, must produce it or account for its loss; 2d. Parole evidence cannot be received to prove title to land, or even its assessment for taxes; 3d. Because the object is to prove a reputation of title to land, which cannot be done, and being admitted: *Held*, that this evidence is illegal and inadmissible; and being admitted absolutely the District Court erred, because it is to judge of the admissibility of testimony and cannot discharge itself from this obligation by transferring it to the jury. It must be satisfied that the best evidence cannot be had before it admits inferior.

This is a petitory action, which was commenced in 1819, to recover from the defendants a tract of land, containing sixty arpents of land in front, by forty-two in depth, on both sides of the Bayou Teche. The plaintiffs derive title in virtue of three Spanish grants of twenty arpents each, to C. & J. Dugat, and J. B. Labeauve, in the year 1777. The defendants claim under the same original title, and set up a chain of title derived therefrom, through several conveyances and possession of the land in contest. See statement of the facts of this case in 12 *Martin*, 445. It was argued in the Western District, at the September term, 1822-3, by Mr.

Bullard for the plaintiffs, and by Moreau Lislet, and Mr. J. S. Johnston for the defendants. See 12 *Martin*, 445, and 1 *Martin*, N. S. 650. WESTERN DIST.
September, 1834.

At the September term, 1827, in Opelousas, an opinion was pronounced, in which the judgment of the District Court was reversed, and judgment entered for the plaintiffs against Prevost's heirs; and in their favor against Macarty's heirs, who were called in warranty. DAVIS'S HEIRS
vs.
PREVOST'S HEIRS.

Mazureau for Macarty's heirs, called in warranty, presented a petition for a re-hearing of this cause, at the September term, 1828. The re-hearing was granted.

Brownson & Hennen for the plaintiffs, replied in writing to the petition for a re-hearing, which without further argument, was submitted to the court.

Martin J., delivered the opinion of the court.

At the request of the defendants, a re-hearing has been granted in this case. On a re-consideration of the opinion already pronounced, we are left under the impression that it ought not to be changed.

It is, therefore, ordered, that the former judgment of this court be maintained, in the same manner, as if no re-hearing had been granted.

WATKINS DEPT.
September, 1834.

CHAIK
vs.
VILLASJOIN.

CHAIK vs. VILLASJOIN.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Where the evidence establishes, that the wife was in the habit, with the knowledge of her husband, and accustomed to make purchases for the use of the family, and he did not object thereto, but had often paid such bills, he will be still bound to pay the amount of such purchases.

This is an action on a store account, annexed to the petition, in which the plaintiff claims from the defendant, the sum of three hundred and twenty-three dollars and sixty-four cents, for goods and merchandise, sold and delivered to the latter in person, and to his wife.

The defendant pleaded a general denial; and averred, that if the articles charged in the petition, were sold to any person, they were not sold or delivered with his knowledge and consent, nor were they sold and delivered to any person, with his authority; that if said goods were purchased by his wife, he is not chargeable with them, as it was at a time when she abandoned his domicile, and was not under his control, &c., which facts were known to the plaintiff; and that he never authorised her to purchase goods. He prays, that the plaintiff's demand be rejected.

The evidence showed, that the defendant purchased a few of the articles himself, and that the remainder were purchased by his wife, but with his knowledge, and without notifying the plaintiff not to sell to her.

The defendant offered in evidence, a suit instituted by his wife, for a separation of bed and board, which suit was filed and dismissed, after the date when the last articles purchased, were delivered.

The plaintiff produced a notice, published by the defendant, notifying all persons whatever, not to trust or give credit to his wife, on his account, as she had abandoned him. The

date of this notice was, the 24th March, 1832, and the last of the purchases were made the 4th of the same month and year.

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September, 1834.

CHAIX
vs.
VILLERJOYE.

The district judge gave judgment in favor of the plaintiff, for the whole amount of his account, with legal interest, from judicial demand. The defendant appealed.

This cause was submitted to the court without argument, by *Mr. Crow* and *Mr. Brownson*, for the plaintiff, and by *Mr. Lewis*, for the defendant.

Martin, J. delivered the opinion of the court.

The defendant is appellant from a judgment, by which the plaintiff recovered the amount of certain articles of merchandise, sold and delivered by the latter, to the wife of the former, who denied she had any authority from him to make the purchase.

The case turns on the mere question of fact, whether such an authority was given by the husband to the wife, as would charge the former.

The district judge, who tried the cause, thought the evidence fully established, that the wife was in the habit, and with the knowledge of her husband, accustomed to make purchases for the use of the family; and that he did not object thereto, but often made payments for such articles.

It does not appear to us, the judge erred.

Where the evidence establishes that the wife was in the habit, with the knowledge of her husband, and accustomed to make purchases for the use of the family, and he did not object thereto, but had often paid such bills, he will be still bound to pay the amount of such purchases.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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GUIDRY ET ALA.
vs.
REES.

GUIDRY ET ALA vs. REES.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

The Civil Code of 1808, article 44, page 462, and page 430, article 10, provides, that the third possessor of mortgaged property, who is not personally liable for the debt, may require the property in the possession of the principal debtor, to be first discussed and sold, before coming on him, if the property of the debtor is not situated in too distant a part of the state.

According to the Code of Practice, article 72, the discussion of property not situated within the jurisdictional limits of the tribunal, where payment is to be made, is *disallowed*.

The provisions of the Code of Practice, limiting the right of discussion to property, situated within the jurisdiction of the tribunal of the place, where payment is to be made, does not apply to contracts; made before its enactment.

The effect of laws is generally prospective; and if they have a retrospective effect in any case, the intention of the legislature must be evident and clearly expressed. It cannot command obedience to laws, affecting the obligation of contracts, entered into before their passage.

It is not necessary, that the money required to defray the expenses of discussion of property, be tendered at the time of filing the plea; it is sufficient, if the money be deposited in court, in pursuance of an order, directing it to be done within a specified time.

This is a hypothecary action, against the third possessor of mortgaged property. The plaintiffs allege, that they obtained a judgment against Jean Guidry, *père*, in the Probate Court, for the parish of St. Martin, for the sum of eight hundred and forty-four dollars, with legal interest, and a legal mortgage thereon, and upon all the property owned and possessed by said Guidry, since the 24th October, 1819; and that in October, 1829, the said Jean Guidry, *père*, then

owner and proprietor of a tract, of five arpents in front, with a certain depth, situated in the parish of St. Martin, sold and conveyed the same to the defendant, who is now in possession. The plaintiffs claim their right of mortgage, on all the estate of said Guidry, in consequence of being their natural tutor. They allege, that they have been unable to satisfy their said judgment, out of any property of his, and they now proceed against the tract of land in the possession of the defendant, which they pray, may be seized and sold, to satisfy their claim, &c.

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GUIDRY ET AL.
vs.
KEES.

The defendant's counsel excepted to the plaintiffs' right, to proceed against the land in his possession, until he discussed a tract of land, containing near six hundred acres, in the parish of St. Landry, which is the one the defendant gave said Guidry, *père*, in exchange for the one the plaintiffs are now pursuing; that the plaintiffs, by their hypothecary action, are required to discuss the property, last in possession of the debtor, before coming on that, now in his possession; which he prays, may be done.

At the November term of the court, a decree was rendered, sustaining the plea of discussion, and suspending all proceedings against the property, in the possession of the defendant, until the plaintiffs have discussed, and caused to be seized and sold, so far as it will be sufficient, the tract of land belonging to the original debtor, to satisfy their claim; and that the cause be continued, until said discussion be carried into effect; and in order to carry on said discussion, the defendant is to deposit, within thirty days, with the clerk of the court, fifty dollars, to defray the expenses thereof; and on failure to pay said sum, within the thirty days from the date of the decree, the defendant is to be forever barred, from setting up and requiring said discussion. From this decree, the plaintiffs appealed.

Simon, for the plaintiffs.

1. The defendant, in this case, cannot avail himself of the plea of discussion, which he sets up. In the first place,

WHITNEY DATA.
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GUIDEX ET ALA.
vs.
BANK.

The Civil Code of 1808, art. 44, p. 462, and art. 10, p. 430, provides, that the third possessor of mortgaged property, who is not personally liable for the debt, may require the property in the possession of the principal debtor to be first discussed and sold before coming on him, if the property of the debtor is not situated in too distant a part of the state.

According to the Code of Practice, art. 72, the discussion of property not situated within the jurisdictional limits of the tribunal where payment is to be made, is disallowed.

The provisions of the Code of Practice, limiting the right of discussion to property situated within the jurisdiction of the tribunal of the place where payment is to be made, does not apply to contracts made before its enactment.

The effect of laws is generally prospective; and if they have a retrospective effect in any case,

in his act of exchange with the principal debtor, he has provided against this action, by reserving a mortgage on the land, by him given in exchange, in case of eviction by an hypothecary action. He also had notice of the plaintiffs' claim and mortgage, and bought at his own peril.

2. The defendant does not bring his case within the provisions of the article 72, of the Code of Practice. No tender of the money, necessary to defray the expenses of discussion, has been made. He cannot avail himself, at any rate, of this plea, as the property is not situated within the jurisdiction of the tribunal of the place, where the payment was to have been made.

Brownson, contra.

Martin, J., delivered the opinion of the court.

The only question which this case presents, is whether a person, who between the year 1808, and the time of the promulgation of the *Code of Practice*, purchased land, affected by a tacit or legal mortgage, may require the discussion of a tract of land, still in the possession of his vendor, lying in any part of the state.

According to the Civil Code of 1808, article 44, page 462, and page 430, article 10, the third possessor of mortgaged property, not personally bound for the debt, may resist the attempt to sell the land or property in his possession, until the land or property in the possession of the principal debtor, within the state, be first discussed, *unless in too distant a part of the state.* Civil Code, p. 434, art. 26.

According to the provisions of the Code of Practice, article 72, the discussion of land or property, *not situated within the jurisdiction of the tribunal, of the place where payment was to have been made, is disallowed.*

It is clear to the court, that this provision, of the Code of Practice, cannot affect the rights, resulting from contracts, entered into before its enactment. The effect of law is gen-

erally prospective. If it may be retrospective in any case, the intention of the legislature must be evident, and cannot command obedience to its will, when the law cannot be executed, without affecting the obligation of contracts, theretofore entered into.

The District court correctly sustained the plea of discussion, in this case; and although the land required to be discussed, was not shown to be situated within the jurisdictional limits of the place in which the payment of the money due, was to be made, but in an adjoining parish, yet the defendant and third possessor, is shown to have bought the land seized, several years before the promulgation of the Code of Practice.

It has been further objected, that no money was paid in, or tendered, when the plea of discussion was filed; but it appears, the District Court directed the deposit in the clerk's office, of a sum of money, to cover the expenses of the discussion and the deposit was made accordingly. This we think was sufficient.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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September, 1834.

SAVOIE
vs.
IGNOGOSO.

the intention of the legislature must be evident and clearly expressed. It cannot command obedience to laws affecting the obligation of contracts entered into before their passage.

It is not necessary that the money required to defray the expenses of discussion of property, be tendered at the time of filing the plea; it is sufficient if the money be deposited in court in pursuance of an order directing it to be done within a specified time.

71 281
45 263

SAVOIE vs. IGNOGOSO.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

A suit for a separation from bed and board, is in the terms and meaning of the law, an *action of divorce*.

The exception to the general rule of evidence contained in the 2300th article of the La. Code, by the third section of the act of 1837, relative to divorces, is not restricted to either species of divorce, but applies to both.

WESTERN DIST. The action of separation from bed and board, in all cases, leads to a divorce
September, 1834. a vinculo matrimonii.

**SAVOIR
 vs.
 SARCOSSA.**

So in a suit for a separation from bed and board, by the wife against the husband, with a view to a divorce, the children of the plaintiff, both majors and minors, are competent witnesses to testify in her behalf.

This is an action for a separation from bed and board, and a divorce, instituted by the plaintiff against the defendant, her husband, on account of cruel treatment, excesses, outrageous conduct towards her, and hatred and neglect of her, to such a degree as to render living together insupportable. She alleges that the defendant has received large amounts of her property, and that of her children, which they inherited, and her portion of the community which existed between her and her late husband; and she fears the said defendant intends to leave the state, without returning, or giving up, or paying for said property; she, therefore, prays for an injunction, to restrain and compel him to deliver up said property, &c.; "and that she be entirely separated in bed and board and in property from the said defendant, and restored to the full administration of the same, &c.": "and she represents that the present suit is brought with a view to an ultimate divorce after the time fixed by the law relative to divorces, &c."

The defendant pleaded a general denial; admitted the marriage, but alleges he has always treated the plaintiff kindly, and if ever any dispute arose between them, it was of a very trifling nature: He charges that his wife has left him and commenced this suit without any just cause, and as he believes, at the instigation of some person, who has intermeddled in his domestic affairs. He prays that her demand be rejected, &c.

On an application of the plaintiff in a supplemental petition, she had her daughter's house and home assigned as her residence during the pendency of the suit, with an allowance of thirty dollars per month for her board, to be paid monthly in advance by the defendant.

On the trial, the plaintiff's counsel under the provisions of the act of 1827, relative to divorces, called several of her children by her first marriage, both majors and minors, as

witnesses to prove the allegations in her petition, relative to cruel treatment of herself and her children by defendant, and of his being guilty of excesses and outrages of such a nature as to render their living together insupportable. The defendant's counsel objected to the admission of the witnesses, as incompetent on the ground of their relationship to the plaintiff, which objection was sustained, and the plaintiff's counsel took his bill of exceptions.

The jury on hearing the other testimony adduced by the parties, returned a verdict for the defendant. After an unsuccessful attempt to obtain a new trial, and judgment being rendered in conformity to the verdict, the plaintiff appealed.

Bowen for the plaintiff.

Lewis for the defendant.

1. Plaintiff's children cannot be witnesses on her behalf, unless the action be one of divorce.

2. The act authorising the children of parties to actions of divorce to testify, is in derogation of the general law of evidence and must be strictly construed.

3. This is only an ordinary action for a separation from *bed and board*, and a new suit must be instituted, to obtain a divorce. *La. Code, 2260, acts, 1827, p. 130.*

Simon on same side.

1. Contended that the new rule of evidence, introduced by the third section of the divorce act of 1827, in which descendants and ascendants were made competent witnesses for each other, only applied in cases of divorce.

2. This is a suit for a separation of bed and board, and not an action of divorce, consequently the provisions of the divorce act, relative to the rules of evidence, do not apply.

3. The suit for a separation of bed and board must first be decided, and a separation obtained, before an action of divorce can be commenced. It is only in the latter suit, that the children of the plaintiff can be called as witnesses.

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SAVOIR
DE.
18X06060.

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SAVOIE
vs.
MORSE.

Mathews J., delivered the opinion of the court.

This is a case in which a wife claims a divorce from her husband, in pursuance of the provisions of the act of the legislature, passed in 1827, in relation to the separation of married persons.

The petitioner claims a separation of property, and divorce from bed and board, on account of excesses, cruel treatment, and outrages committed on her by her husband; alleging that her intention is to obtain finally, a divorce from the bonds of matrimony.

To prove the alleged outrages, she offered as witnesses some of her children, who were excepted to as incompetent, and the exception was sustained by the court below; and to the opinion by which these witnesses were rejected a bill of exceptions was taken, &c. Judgment was rendered against the plaintiff, from which she appealed.

The examination of this bill of exceptions requires from this court (for the first time) an interpretation or construction of the act of the legislature, on which this action is founded. The only question, however, for solution, relates to the competency of witnesses to testify for or against their ascendants or descendants. As a general rule, they are rendered incompetent by the art. 2360 of the Louisiana Code, and unless an exception to this rule be found in the act under consideration, the judge *a quo* acted correctly in rejecting the witnesses offered on the part of the plaintiff, in the present case.

The causes for which divorces may be claimed, as specified in the law, are adultery, excesses, cruel treatment or outrages, condemnation to an ignominious punishment, and abandonment. These causes are all laid down in the eleventh section of the act. The second establishes the tribunals for the trial of cases in which divorces are claimed: And the third provides that "all actions of divorce shall be tried as all other cases, *provided*, that no witness summoned by the parties, shall be declared incompetent under the pretence of their being the allies or relations of either plaintiff or defendant.

If these sections of the law stood alone, no doubt could be entertained of the section last cited, enacting an exception to

the general rule of competency established in relation to ascendants and descendants: Otherwise the proviso will be without effect. But the fourth section of this act, is expressed in the following terms: "Except in cases where the husband or wife may have been sentenced to any infamous punishment, or convicted of adultery, as provided for in the first section of this act, no divorce shall be granted, unless a judgment of separation from bed and board, shall have been previously rendered between the parties, and unless two years shall have expired from the date of the judgment of separation from bed and board, and no reconciliation may have taken place; provided, that in the cases excepted above, a judgment of divorce may be granted in the same decree, which pronounced the separation from bed and board.

This section, unless its provisions be clearly contrary to those of the preceding sections, cannot, according to any just interpretation of laws, abrogate the rules established by them. The meaning and tenor of the whole law, taken together, appears to us to be applicable to either species of divorce, as well that which goes no farther than a separation from bed and board, in its primary effects, as that which at once dissolves the bonds of matrimony. The former is as complete a separation of the parties to the matrimonial engagement as the latter, with the exception that no new marriage of either could be legally made. The claim of separation from bed and board, is in the terms of the law, an action of divorce, and the exception contained in the proviso of the third section, to the general rule of evidence established by the Code, is not restricted to either species of divorce; it therefore, embraces both. The action of divorce, which has for its object a separation from bed and board, will, in all instances, tend to a final and absolute discharge of the parties *ab vinculo matrimonii*, and leads directly to that result, in the event of no reconciliation, within the time limited by law. The first intention of the legislature, seems to be an offer of relief to the injured party, from outrages repugnant to the feelings of humanity, and ultimately to place the sufferer in a situation to form a more congenial matrimonial connection. But, if

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A suit for a separation from bed and board, is, in the terms and meaning of the law, an action of divorce.

The exception to the general rule of evidence contained in art. 9260 of the La. Code, by section 3 of the act of 1827, relative to divorce, is not restricted to either species of divorce, but applies to both.

The action of separation from bed and board, in all cases leads to a divorce *a vinculo matrimonii*.

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So in a suit for a separation from bed and board by the wife against the husband, with a view to a divorce, the children of the plaintiff, both majors and minors, are competent witnesses to testify in her behalf.

the construction assumed by the court below, be adopted, a principal means of arriving at the final result, contemplated by the legislature and authorised by the law, will be rendered void and utterly unavailing. By allowing the parties an opportunity for reconciliation, we do not believe that the law makers intended to destroy the means of relief previously held out to a suffering husband or wife.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled, and that the cause be remanded to said court, to be tried *de novo*, with instructions to the judge, to permit the children of the plaintiff, to testify in this case. And it is further ordered, that the appellee pay the costs of this appeal.

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MELANÇON'S HEIRS vs. DUHAMEL ET ALS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Where judgment of eviction is obtained, against the purchaser of a tract of land, while suit is pending for the price, and the purchaser calls the plaintiffs (his vendors) in warranty, to protect his title, and at the same time pleads the eviction, asks a rescission of the sale, and a discharge from the contract; when there is no evidence of an actual dispossession or ouster of the defendant, either forced or voluntary, the plaintiffs will recover the *price*, on preventing the execution of the judgment of eviction, by tendering to the defendants and vendees, a renunciation of all the benefits and advantages under it, by the person who obtained it.

The execution of a contract, according to its terms, and the intentions of the parties, is more consonant to justice, law and equity, than the rescission of it, and a condemnation in damages, when the contract remains entire, and there is no change in the situation of the parties.

This action was originally commenced, to recover the price of a tract of land, sold at the probate sale of Melançon's estate, and purchased by the defendant Duhamel. The suit was instituted against Duhamel, and Latiolais, his surety. Before judgment, Duhamel was evicted of a large portion of the land, by Pierre Broussard. The defendants now pray for a rescission of the sale, and to be discharged from the contract. Duhamel being dead, the suit is continued by the curator of his estate, and his surety. The case has been several times before this court. See 4 *La. Reports*, 362.

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On the return of the case to the District Court, at the October term, for the parish of St. Martin, in 1832, the district judge being of opinion, that the eviction pleaded by the defendants was fully proven, that they were entitled to have the sale of the land, for the price of which they were sued, rescinded, gave judgment, annulling and cancelling the sale, and discharging the defendants from all liability under said contract and sale.

The plaintiffs relied on the act of renunciation, executed by Broussard, in which the latter renounced the benefit of the judgment of eviction he had obtained against Duhamel, and abandoned all the advantages resulting therefrom, to the plaintiffs in this suit. See 2 *La. Reports*, 8.

Judgment being rendered against the plaintiffs, they appealed.

Brownson, for the plaintiffs, said this case would depend mainly, on the effect given to the act of renunciation of Broussard. These plaintiffs having been called in warranty, by the defendants, when the latter were sued by Broussard; although judgment of eviction was pronounced in his favor, yet the tender to the defendants, of a complete and full renunciation by Broussard, of the advantages arising from said judgment, renders them completely secure in their title, and the case stands as if no eviction had happened.

2. The defendants never abandoned the land, nor were they ever turned out of possession by Broussard; they must

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Where judgment of eviction is obtained against the purchaser of a tract of land while suit is pending for the price, and the purchaser calls the plaintiffs (his vendors) in warranty to protect his title, and at the same time pleads the eviction, asks a rescission of the sale and a discharge from the contract; when there is no evidence of an actual dispossession or ouster of the defendant, either forced or voluntary, the plaintiffs will recover the price, on preventing the execution of the judgment of eviction, by tendering to the defendants and vendees a renunciation of all the benefits and advantages under it by the person who obtained it.

The execution of a contract according to its terms and the intentions of the parties, is more consonant to justice, law and equity, than the rescission of it and a condemnation in damages; when the con-

In the answer to this amended petition, the defendants repeat the same objections, and further allege, that the judgment in favor of Broussard, in the Supreme Court, had been ordered to be executed, and that the land had actually been taken from the defendants, before the renunciation of Broussard, in consequence of which, the defendants had acquired a right, which could not be affected by the subsequent act of one of the parties.

The defendant Latiolais, the surety, in a separate answer, averred, that in consequence of the facts and circumstances alleged, in the original answer, and in the subsequent ones, he had been legally discharged from all liability, resulting from his suretyship, and that none of the allegations in the amended petition, could affect him, as by the act of the plaintiffs, the subrogation to their right, privilege and mortgage, could no longer be made to operate in favor of Duhamel.

The District Court sustained the defence, and decreed a rescission of the sale. The plaintiffs appealed.

The bill of exception taken, to the admission of the amended petition, was acted on when this case was last before this court. See 4 *La. Reports*, 362.

The record contains no evidence of an actual dispossession or ouster of Duhamel, either forced or voluntary. The present plaintiffs being called in warranty, to defend their vendee, in the opinion of this court, fully answered the call, by preventing the execution of the judgment of Broussard, and giving to their vendee, an absolute protection against the consequence of the judgment.

The execution of a contract, according to its terms, and the intention of the parties, is more consonant to justice, law and equity, than the rescission of it, and a condemnation in damages; provided, the contract or matter is still entire, and there has been no change in the situation of the parties.

Had the judgment in favor of Broussard, been followed by the execution of a writ of possession, or had Duhamel voluntarily executed it, by abandoning the premises, his claim against his vendor, would have been perfect, and the latter

could not have escaped from the consequences of the ouster of his vendee ; and if the vendee, notwithstanding he had neither been formally ousted, nor relinquished his possession, could show, that on the judgment of Broussard being signified to him, he had taken measures to provide against its consequences, as by the purchase of another tract, so that the matter was not *res integra*, we are not even prepared to say, that he might not have successfully claimed relief against his warrantors.

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tract remains entire and there is no change in the situation of the parties.

It may be said, that the judgment in favor of Broussard, affected the land recovered, with any general mortgage that may have existed on his property ; that Duhamel contracted for Melançon's title, and not for that of Broussard. To the first part of the objection, it is a sufficient answer, that *de non apparentibus et de non existentibus eadem est lex* ; and that he, whose claim is grounded on the apprehension of demands from creditors, with a general mortgage, ought to show that a general mortgage exists. To the second part, an equally successful answer can be made. For, that even after a decision, that the plaintiffs, by procuring Broussard's renunciation, have complied with their obligation to warrant and defend Duhamel's title, they shall not be absolved from the obligation of defending it, in case any person claiming under Broussard, or as his mortgage creditors, should disturb the heirs of Duhamel in their possession.

Broussard's renunciation, at any time before he obtained the judgment against Duhamel, would have disabled the latter from resisting the claims of the plaintiffs. His renunciation of that judgment, does not appear to this court, less efficient ; and if it ever should prove insufficient, the remedy of Duhamel or his heirs, against his vendors, will be the same. Should he show, that there is room for apprehension, he might guard against its consequence, by a demand of security.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed ; and proceeding to give such a judgment, as in our

WESTERN DIST. opinion, ought to have been pronounced, in the court of the
September, 1834. first instance, it is ordered, adjudged and decreed, that the
ROBIN ET ALS. plaintiffs recover from the defendants, the sum of three
vs. thousand and eighty-five dollars, with legal interest, from the
CASTILLE. time the instalments became due ; and that the land be first
 seized and sold, to satisfy said judgment, before the judgment,
 or any part thereof, be claimed from the defendant Latiolais :
 the defendants paying costs in this court.

ROBIN ET ALS vs. CASTILLE.

**APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
 THEREOF PRESIDING.**

The heirs of the deceased wife, who dies without leaving descendants, have
 a right at once to demand her paraphernal property, without waiting for
 a settlement and liquidation of the community of acquets and gains,
 with the surviving husband.

The wife, during the existence of the community, has a right to resume the
 administration of her paraphernal property.

When the wife dies, *her heirs* are seized of all the effects, constituting her
 separate estate, from the moment of her decease.

Money received by the husband during marriage, on account of his wife,
 does not fall into the community, but remains her separate property.

This is an action by the plaintiffs, who are the father, and
 brother and sisters, of Aimé Robin, deceased, late wife of the
 defendant, J. B. Castille, to recover from him two sums
 of money, of seven hundred and thirty-nine dollars, and
 seven hundred and thirty dollars, which he received as
 portions, during marriage, inherited by his said wife from
 her grandmother. The defendant gave his two receipts,
 dated in 1829 and 1830, for said sums of money. His wife
 afterwards died, without leaving any descendants, and the

plaintiffs being the only surviving legitimate heirs, claim these sums, with a legal mortgage on all the defendant's property, for their re-payment, amounting in all to one thousand four hundred and sixty-nine dollars.

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VS.
CASTILLON.

The plaintiffs pray judgment against the defendant, for said sum of money, with legal interest thereon, and that they may be decreed, to have a legal mortgage on all his lands and slaves, from the several periods when said sums of money were received by him.

The defendant pleaded a general denial ; that the plaintiffs accorded him, by an act signed before a justice of the peace, one and two years, to pay whatever sums he might owe them, wherefore this action is premature, and ought to be dismissed. He further alleged, that a community of property existed between him and his late wife, to which the plaintiffs have never renounced, but have accepted it purely and simply ; that the community has not been settled, and the plaintiffs cannot set up any right or claim against him, until a final settlement is had ; that the community owes a number of debts, and is subject to many charges, to which the plaintiffs ought to contribute, and which cannot be ascertained, until a liquidation and regular settlement takes place ; and that when a settlement is had, he will not be found indebted, or if he owes any thing, it is very small ; and that the plaintiffs have no right to proceed in this suit ; he prays that their demand be rejected, &c.

The plaintiffs introduced in evidence, in support of their demand, the two receipts set out in their petition, and given by the defendant, for the money sued for, with proof of their execution.

The defendant introduced the inventory and proceedings in the Probate Court, had in relation to his wife's succession. The inventory of her property, as taken by the parish judge of St. Martin, amounted to only one thousand one hundred and ninety-nine dollars, besides a few small debts.

The district judge gave judgment for the amount of the plaintiffs' claim, with interest, and mortgage on the defendant's estate, until final payment. The defendant appealed.

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VS.
CASTILLE.

Lewis, for the plaintiffs.

1. Plaintiffs, as heirs of defendant's deceased wife, have a right to sue for and recover from the defendant, the amount of her paraphernal property, received by him, *without previously* renouncing the community between them.

2. The simple fact of not renouncing, does not amount to an absolute acceptance of said community. They might be called on to accept or renounce, and in that event only, are they bound to decide, which they will do. *La. Code, 2383 and 2379.*

3. Even if plaintiffs had accepted the community, still defendant is bound to account to them for the paraphernal rights of his wife, and the rights of the parties in the community remain as they were before instituting this suit.

Simon, for the defendant, contended, that the heirs of the deceased wife could not sue the surviving husband for her interest in the community, until it is settled and the debts paid off.

2. The heirs cannot sue until they renounce the community of property belonging to the deceased wife. Until this is done, which has not been done here, they cannot recover back her dotal or paraphernal effects. *La. Code, 2379, 2380 and 2381. 4 Favard, 884.*

Bullard J., delivered the opinion of the court.

The plaintiffs sue as heirs at law, of the deceased wife of the defendant, for the sum of one thousand four hundred and sixty-nine dollars, received by him during the marriage, as the share of his wife, in the succession of her grandmother, and which constitute her paraphernal estate. The defendant resists their claim, on the plea, that there existed between him and his late wife a community of acquets and gains, which the plaintiffs have never renounced, but which on the contrary, they have accepted purely and simply; that the community has never been in any way settled, nor partaken between him and the plaintiffs; that it is only in settling the community, that the rights of the parties against it, can be

ascertained and liquidated, and that the plaintiffs have no right to set up any claim against the respondent, until the said community is brought to a final settlement; that the plaintiffs are bound to pay one-half of the debts of the community, and that on a fair settlement, it will be found, that the defendant is not indebted to the amount claimed.

This exception presents, for the consideration of the court, the question, whether the heirs of the wife have a right, at once to demand her paraphernal property, without waiting for a settlement and liquidation of the community of acquets and gains. The argument in support of the negative of that proposition, goes to assume as a principle, that money received by the husband during the marriage, on account of his wife, is mixed and blended with the property composing the community, and forms a charge upon it, rather than a debt due by the husband. And yet it is admitted, that the wife, on renouncing the community, has a right to claim her paraphernal property. The 2380th article of the Louisiana Code, declares that "the wife who renounces, loses every sort of right, to the effects of the partnership or community of gains. But she takes back all her effects, whether dotal, extra dotal, hereditary or proper." The counsel for the appellant infers from this article, that it is only on her renunciation, that she has a right to take back her paraphernal estate. This reasoning is not satisfactory to this court. Such a principle would be inconsistent with certain well settled doctrines of our law; 1st, That the wife herself, even during the existence of the community, has a right to resume the administration of her paraphernal property; and 2d, That constituting her separate estate, her heirs are seized of it, at the moment of her decease. If instead of money, the husband had received property, still existing in nature, the heirs would undoubtedly have been entitled at once, to the possession of it. Indeed the converse of the proposition, contained in the article of the Code above cited, cannot be correct; to wit: that if the wife does not renounce, she shall not take back her separate estate, because the only consequence of accepting the community, is to render her liable for one-half of the debts.

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The heirs of the deceased wife, who dies without leaving descendants, have a right at once to demand her paraphernal property, without waiting for a settlement and liquidation of the community of acquets and gains with the surviving husband.

The wife during the existence of the community, has a right to resume the administration of her paraphernal property.

When the wife dies, her heirs are seized of all the effects constituting her separate estate, from the moment of her decease.

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ROBIN ET ALA.

vs.

CASTILLE.

Money received by the husband during marriage on account of his wife, does not fall into the community, but remains her separate property.

The authorities cited from French commentators, refer to a system different from that established by the Louisiana Code. It is believed, that under the Code Napoleon, a sum of money received by the husband on account of his wife, during marriage, belongs to the matrimonial community, and consequently is affected to all the charges upon it, and could only be accounted for to the heirs on a final liquidation and settlement of the community. By our Code, it is different; money so received, does not fall into the community.

But it is contended, that the heirs of the wife in this case, are bound to pay one-half of the community debts, out of her separate estate, and that consequently, they ought not to be permitted to withdraw this fund from the hands of the surviving husband, until the debts shall have been paid. Whether the heirs be bound to pay the debts, is in our opinion, a question between them and the creditors. The husband is, at all events, liable for the whole, and a partition of the community cannot be made, without provision for them; but it does not, in our opinion, follow that the husband is authorised, after the dissolution of the marriage, to retain the paraphernal property of his deceased wife.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the District Court be affirmed, with costs.

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KEY vs. WALKER.

KEY
vs.
WALKER.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

The record of a suit between other parties, evicting the third possessor, is legal evidence in an action by the third possessor against his vendor, to prove the fact of eviction and the damage sustained by him in consequence thereof.

Where the petition alleges the plaintiff was evicted by a certain suit between two other persons, and refers to it by name and description, it is a sufficient allegation to authorise the admission of such record in evidence, in an action against the vendor for damages.

It is not necessary that the defendant, who is the vendor sued, had notice of a suit and proceedings evicting his vendee, to authorise the admission of those proceedings in evidence against him. That matter may go to the effect of the evidence, but not to its admissibility.

This is an action of warranty to recover damages of the defendant in consequence of eviction from a tract of forty superficial arpents of land.

The plaintiff purchased of the defendant by public act, dated the 1st of June, 1831, a tract of forty supercial arpents with warranty of title, and also all the defendant's *right of settlement* to the balance of one hundred and sixty arpents, for the sum of six hundred dollars in cash.

Shortly after this sale, Alexander Lewis obtained an order of seizure and sale, against the tract of forty arpents, on his mortgage against one Henry R. Nerson, from whom the defendant had purchased it, and had the land sold, by which the plaintiff was evicted.

He now brings his action of warranty to recover back the sum of six hundred dollars with interest, which he had paid to the defendant; and also, prayed for and obtained an attachment against four slaves belonging to the latter, on an

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allegation and affidavit, that the defendant was about to remove permanently from the state.

In his petition, the plaintiff alleges his eviction, and "that the land has been sold by Alexander Lewis, to satisfy his said mortgage, which will more fully appear, by reference to an act of seizure and sale, granted by the honorable judge of the District Court, *and on the files of said court,*" &c.

The defendant, by written motion, moved to dissolve the attachment on the ground, that it was not true he was about to leave the state, &c.

On the merits, the defendant pleaded a general denial; admitted the sale of the land, but alleged that the consideration expressed therein, of six hundred dollars, was not for the forty arpents mentioned in the petition, but was for said forty arpents, and also, one hundred and sixty other arpents of land, adjoining the said forty arpents, and he only warranted the forty arpents, and sold to the plaintiff his right of settlement for the said one hundred and sixty arpents without warranty. He alleges that there were valuable improvements on the last tract, which were also included in said sale, and which were reasonably worth five hundred dollars. He denies that the plaintiff is entitled to recover any sum from him, by reason of his illegal and vexatious conduct in suing out his attachment, which he alleges was wrongfully sued out, and under false pretences, with a view to harrass defendant's property, &c.; and that by attaching and detaining four of his slaves, he has sustained damages to the amount of five hundred dollars, for which he claims judgment in reconvention, and prays that the plaintiff's demand be rejected, &c.

The motion to dissolve the attachment was sustained, and the cause referred to a jury for trial on the merits.

A witness for defendant by the name of Walker, declares on oath, that the plaintiff seized a negro woman and two children, and a negro boy, under his attachment, which were taken out of defendant's possession, in consequence of which he had to break up house-keeping, and sustained much loss in furniture and stock.

Bendy, a witness for plaintiff, swears defendant had but little furniture or stock. Heard defendant say he was going to move his cattle to Texas, and that he was going there himself. Witness was under the impression he intended to go.

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On the trial, the plaintiff offered in evidence, "the record of an order of seizure and sale, and all the proceedings had thereon, of Alexander Lewis, against Henry R. Nerson, which his counsel declared he intended to prove thereby, and by other evidence, that the plaintiff had been evicted from the land purchased from the defendant, in consequence of a mortgage existing on it in favor of Lewis, at the time of the purchase, &c. The evidence was objected to, and the objection sustained, and a bill of exceptions taken to the decision of the court.

The jury returned a verdict, on hearing all the other evidence in favor of defendant's claim in reconvention, of thirty-eight dollars and sixty-one cents. Judgment being rendered thereon, the plaintiff appealed.

Brownson, for the plaintiff.

Lewis for the defendant.

1. New trial was properly refused, because the case does not come within any of the rules established by the Code of Practice, art. 560.

2. There is no legal evidence of misconduct in the jury.

3. The jury had a right to make up their verdict as they did. 4 *Johnson's Reports*, 487.

Mathews, J., delivered the opinion of the court.

This is an action of warranty, in which damages are claimed on account of an alleged eviction from a certain tract of land, sold by the defendant to the plaintiff, &c.

The suit was commenced by attachment. The defendant afterwards appeared and answered, and filed a plea in reconvention. The cause was submitted to a jury in the court below, who found a small sum in favor of the reconvenor, and judgment being thereon rendered, the plaintiff appealed.

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The record of a suit between other parties, evicting the third possessor, is legal evidence in an action by the third possessor against his vendor, to prove the fact of eviction and the damage sustained by him in consequence thereof.

Where the petition alleges the plaintiff was evicted by a certain suit between two other persons, and refers to it by name and description, it is a sufficient allegation to authorise the admission of such record in evidence, in an action against the vendor for damages.

It is not necessary that the defendant, who is the vendor sued, had notice of a suit and proceedings evicting his vendee, to authorise the admission of those proceedings in evidence against him. That matter may go to the effect of the evidence, but not to its admissibility.

A bill of exceptions is found on the record to an opinion of the judge *a quo*, by which he rejected the record of a suit which was in the nature of an action of mortgage, brought by one Alexander Lewis against a certain Henry R. Nerson, on which an order of seizure and sale was obtained and executed, on a tract of land in the possession of the plaintiff as purchaser from the defendant, &c.

This evidence was rejected on several grounds: 1st. As being *res inter alios acta*. 2d. Because its introduction is not authorised by the allegations of the petition; and, 3d. Because no knowledge of the proceeding was brought home to either plaintiff or defendant in the present suit.

We are of opinion that the court below erred, in rejecting the evidence offered. It is a record of proceedings in pursuance of which the property in the possession of the plaintiff, held under title from the defendant, was sold, and is certainly good and legal evidence to prove *rem ipsam*; a fact clearly necessary to support the allegations in the petition. Whether it be conclusive to establish such an eviction as would authorise the present action of warranty on the part of the appellant, is a question different from that which relates to the legality or admissibility of the testimony offered. The petition, although, perhaps, not drawn up with the greatest possible precision and technicality, appears to us to have sufficient reference to the fact offered to be proven by the record adduced, to authorise its admission. Whether Walker, the defendant, had or had not knowledge of that proceeding, is a matter that may have its effect in a trial of the cause on its merits; but, according to the view which we have taken of the subject, cannot legally influence the question of admissibility.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled, and the verdict of the jury set aside; and it is further ordered, that the cause be remanded, with directions to said court to permit the record, &c. to be given in evidence. The appellee to pay the costs of this appeal.

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September, 1834.

PATIN ET ALs.
vs.
PREJEAN ET ALs.

PATIN ET ALs vs. PREJEAN ET ALs.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

The Code of Practice has re-enacted the same general rules, in relation to the discussion of property by creditors, having a general mortgage on the property of their debtors, as was provided by the act of 1817, requiring them to proceed against the property last alienated, and ascending towards that first sold, until their claims be satisfied.

A right or title, acquired under a contract, cannot be modified or affected by any subsequent act of the legislature; but the remedy or means given by law, to enforce those rights, are always in the power of the legislature, who may extend or restrict them, as circumstances may require.

The means by which a minor's rights, against the property of his tutor, are to be enforced, are always in the power of the legislature. In requiring him to discuss property last alienated, before coming on that previously sold, although the law was enacted after his mortgage attached to the property of his tutor, yet it was in the power of the legislature to pass it.

The plaintiffs allege, that they obtained a judgment against their father and natural tutor, Marcel Patin, on the 10th day of September, 1825, for two thousand four hundred and thirty-six dollars twelve cents, being eight hundred and twelve dollars four cents, in favor of each of them, with legal interest, on the claim or portion of each, from certain dates, and with a legal mortgage on all their father's property, which he owned and possessed, at any time since the 15th day of July, 1812, the date of the natural tutorship.

In October, 1828, the syndics of Marcel Patin, who had become insolvent, presented a tableau of distribution of his estate, among his creditors, which was homologated, on which the plaintiffs were placed, for the aggregate sum of nine hundred and twenty-eight dollars sixty-nine and three-fourth cents, leaving still a balance of two thousand and

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forty-nine dollars, on said judgment, against their father, unpaid. They allege, they have made an amicable demand on the syndics, for the balance of their debt; who replied there was no more property or funds of said estate in their hands.

The plaintiffs further allege, that their said father was owner of a plantation, now in the possession of the widow Prejean and heirs of N. Thibodeau, which was alienated by him, in 1814; that he was owner of a negro man Harry, now in the possession of Martin Sudrique, who was sold by him, in 1823; and that he was owner of a negro woman Françoise, and her child, now in possession of Valery Martin, which he sold in August, 1823; all of which property, the plaintiffs charge to be subject to their legal mortgage, as having been alienated since the mortgage began to exist, and that it is liable to the payment of their respective claims. They pray that these parties be cited, to show cause why the said property shall not be seized and sold, to satisfy the balance of the aforesaid judgment, with interest and costs.

The defendant, widow Prejean, and as tutrix of the minors Thibodeau, pleads a general denial; and alleges, that the plaintiffs are bound to prosecute their claim (if any they have) against the mortgaged property last sold, and ascending to that first sold; she alleges a sale of an undivided tract of land, by Marcel Patin, in November, 1819; and another tract, sold in November, 1820, all of which, together with the other property sued for, she prays may be first discussed and proceeded against, before coming against the plantation in her possession; she prays the court to fix the amount of the sum she is to pay, to carry on the discussion, and tenders it in open court.

Sudrique answered, reserving his right to dispute the plaintiffs' claim, and alleged, that the plaintiffs were bound to proceed against the negro woman Françoise and her child, in the possession of Valery Martin, as being last sold, before coming on him.

Martin answered, and pleaded a general denial; he denied specially, that Marcel Patin was tutor of plaintiffs, or that

any mortgage existed on the property in his possession ; he denies that the plaintiffs are entitled to any thing, as heirs of their mother ; that after the death of their mother, the community which had previously existed between her and their father, *was continued*, and was administered by the father, for the benefit of all the parties concerned ; that during its continuance, debts were contracted, and property purchased, in the name of the father ; that among the debts contracted, there was one in favor of the Louisiana State Bank, one in favor of M. White, and one in favor of F. Breaur, on which judgments were obtained and executions issued, and on the 28th of August, 1823, a negro girl named Françoise, and her child, were seized and sold, when the defendant became the purchaser, for five hundred and thirty-five dollars, subject to the payment of two hundred and five dollars, with interest, and a special mortgage in favor of A. Guidry, which he has paid ; he further alleges, that the property so purchased by the said Marcel Patin, was acquired by him, subsequent to the death of the plaintiffs' mother, and was liable to the payment of said debts ; and that the plaintiffs have received from their father, various articles of property, for which they have given no credit ; that the community of property continued, until after the purchase of the negro woman and her child ; and which was sold as community property to pay community debts, for the payment of which the plaintiffs were also bound. He prays that the plaintiffs' petition be dismissed, &c.

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On these issues the cause was tried at the April term, 1832, of the St. Martin's District Court. The plaintiffs produced in evidence, the judgment in the Probate Court, against their father, in which they recovered the amount now claimed, after deducting a small credit.

The defendants introduced in evidence, two acts of sale, made of two tracts of land, in 1819 and 1820, which were required to be discussed, in the answer of the widow Prejean, before proceeding against her.

The district judge being of opinion, the plaintiffs were entitled to the amount of the judgment claimed, in their

WESTERN DIST. petition, against the defendants, Sudrique and Martin, and
September, 1834. that they were bound to discuss the property in their possession before coming against the property of the other defendants, ordered, that the negro woman and her child, in the possession of Martin, and the negro man Harry, in possession of Sudrique, be seized and sold, to satisfy the plaintiffs' demand, and that the cause be continued as to the other defendants.

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The sheriff returned an account of sales, of the slaves ordered to be seized and sold, by which it appeared they sold for seven hundred and forty dollars, still leaving a large balance of plaintiffs' judgment unsatisfied.

At the November term, 1833, of said court, the trial of this cause proceeded. Judgment was rendered on the evidence already introduced, when it was ordered and decreed, that the proceedings against the property, in the possession of the widow Prejean, be suspended, until the plaintiffs have discussed the two tracts of land, sold in 1819 and 1820, by the plaintiffs' father, and now in the hands of third possessors; and that the defendant, widow Prejean, pay into court the sum of seventy-five dollars, within thirty days from the date of the decree, to defray the expenses of the discussion, and on failure, to be forever barred from requiring or setting up said discussion. From this decree the plaintiffs appealed.

Simon, for the plaintiffs.

Brownson, *contra*.

Martin J., delivered the opinion of the court.

The plaintiffs seek to obtain payment of a judgment, which they have obtained against their late tutor, by the sale of a tract of land, sold by him. The attempt is refuted by the defendants, who point out another tract, sold by the tutor, after he had sold that in the possession of the defendants. The plaintiffs contended, that as their tutor had sold the tract, in the possession of the defendants, before the year

1817, the latter could not avail themselves of the act passed in that year, which requires creditors, with a general mortgage, to seize at first the land last sold by their debtors. The plea of discussion was sustained, and the plaintiffs appealed.

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It is contended in this court, that the act of 1817, invoked by the defendants, established a rule of practice, and is consequently repealed by the Code of Practice, and that if it be not repealed, the defendants cannot avail themselves of it, because their ancestor purchased the land, before the passage of the act.

The Code of Practice, 715, provides that, in regard to sales under a *feri facias*, the purchaser against whom a suit is commenced by a creditor, having a legal or judicial mortgage on the property of the debtor sued, may require the creditor to discuss the other property, in the possession of the debtor, before coming on that which he has in his possession; and even that which the debtor has alienated since the purchase.

Had the legislator gone no farther, it might be urged on the one side, that he intended only a special provision, confined to the cases of purchases at a sheriff's sale, and on the other side, that it being difficult to discover, why a different rule should be established, in regard to such sales, it might be safely concluded, that the reason evidently extending to every sale, all should be regulated in the same manner.

But the legislator proceeds, and gives us the grounds on which he acts, "because the creditor who has a general mortgage, can only act against the property, which his debtor has disposed of, in the order in which the alienations have taken place, beginning at the most recent, and ascending to the most ancient."

If the rule of practice, in this respect, established by the act of 1817, and invoked by the defendants, was repealed as a rule anterior to the Code of Practice, still the principle is recognised and incorporated in that Code, that the creditor, with a general mortgage, must proceed against the property alienated by the debtor, by beginning at that most recently

The Code of Practice has reenacted the same general rules in relation to the discussion of property by creditors having a general mortgage on the property of their debtors, as was provided by the act of 1817, requiring them to proceed against the property last alienated and ascending towards that first sold, until their claims be satisfied.

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A right or title acquired under a contract, cannot be modified or affected by any subsequent act of the legislature; but the remedy or means given by law to enforce those rights, are always in the power of the legislature, who may extend or restrict them as circumstances may require.

The means by which a minor's rights against the property of his tutor are to be enforced, are always in the power of the legislature. In requiring him to discuss property last alienated before coming on that previously sold, although the law was enacted after his mortgage attached to the property of his tutor, yet it was in the power of the legislature to pass it.

disposed of, and ascending towards that first alienated, until his claim be satisfied.

It remains for us to examine, whether purchasers, before the act of 1817, may avail themselves of a legal provision, enacted since the perfection of the contract, under which the land was acquired.

It cannot be doubted, that the title or rights, acquired under a contract, cannot be modified or affected by any subsequent act of the legislature; but the means of enforcing such rights, and protecting such titles, in other words, the remedy provided by law, to insure the enjoyments of such rights and titles, is always in the power of the legislature, who may extend or restrict it, as circumstances may require.

The lien on the land of the tutor, which results from the trust committed to the tutor, cannot be destroyed or modified, without a correspondent destruction or modification of the minor's rights; but the means by which the minor's rights may be enforced, his remedy is always within the power of the legislature. In requiring him to proceed against the property, most recently alienated by the tutor, the minor's rights or lien in the rest, is not destroyed or modified. Some delay, indeed, is thereby created; but every citizen who is obliged to resort to the court, to enforce his rights, must submit to the forms and delays which the law has prescribed, or may from time to time prescribe.

At the passage of the act of 1817, the minors would have been bound to seize first the tract of land which they are now called on to discuss, because then it was in the possession of their tutor. That act, in requiring them to discuss the same tract after a sale, did not put them on *deviore casu*.

It does not appear to us, that the District Court erred.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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ROMERO ET AL.
vs.
SEGURA.

ROMERO ET AL. vs. SEGURA.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Where the payee of a promissory note, payable to order, transfers it in writing on the back of the instrument, for twenty per cent. discount, it will be considered a sale, not an endorsement, in which the purchaser will be considered as having taken the risk of the solvency of the maker, without recourse on the transferor; and such a contract is, in its nature, aleatory and not usurious.

Where the sale of a promissory note by the payee, in insolvent circumstances, has been made for *one-fifth less* than the amount promised on the face of it such sale may be rescinded by the creditors of the insolvent; but they would be bound, first to refund the purchase money, when there is no evidence of fraud on the part of the purchaser.

This action is instituted on the following promissory note :

“Nouvelle Iberie le 11 Octobre 1831.

“Au premier Avril prochain, je payerai à Mr. Louis Segura, ou à son ordre, la somme de trois cent quatre-vingt-quinze piastres, avec les intérêts d'un dix pour cent, à compter du jour de la date jusque parfait payement, pour valeur reçu.

“\$395.

“St. Yago Segura.”

Endorsement on the back.

“Reçu le payement à l'escompte de 20 pour cent, par Messieurs Antoine & Michel Romero, fils, que je leur cède.

“Ls. Segura.

“Paroisse Ste. Marie le 30 Décembre 1831.”

The defendant pleads a general denial, and admits his signature as the drawer of the note. He alleges the note was given in consideration of a sale made by Louis Segura, to him, of all the rights and pretensions of the latter, to the succession of his father Francisco Segura, and that the said rights and pretensions, were, a very short time afterwards, seized by one of Louis Segura's creditors, together with the

WESTERN DIST. note sued on, and two others of the same tenor. He further
September, 1834. states that he is threatened with a suit, to annul said sale
ROMERO ET ALA. made to him, and for the recovery of the amount of these
DR. notes ; he also charges that the plaintiffs gave no considera-
SEGURA. tion for the note, or if any, that it was illegal and usurious ;
and that the date of the transfer of the note is false, and was
made but a few days before the filing of the *bilan* of Louis
Segura, and at a time when he was in failing circumstances,
within the knowledge of the plaintiffs and transferees of the
note. He likewise charges fraud and collusion between the
plaintiffs and transferor of the note, and alleges it would
be unsafe to pay it on account of the claims of Segura's
creditors, &c.

The syndic of Segura's creditors intervened and opposed the plaintiffs' right to obtain judgment, and alleged the want of consideration, and that the note showed an usurious discount on its face by the transfer to the plaintiffs, and that the transfer was made at a time when Segura was notoriously insolvent. He joins the defendant in resisting the plaintiffs' demand ; and prays that the note be declared to belong to the insolvent estate of Segura, and that he may have judgment for the amount of it, for the use of the creditors.

The defendant and intervenor's counsel offered in evidence the record of a suit, and judgment in favor of Perrault & Pascal *vs.* L. Segura, and also the return on the execution, which issued on it, by which it appeared that the sheriff, on the 31st December, 1831, the day after the transfer of the note sued on, seized certain notes, alleged to be the property of Louis Segura, together with all his interest in his father's succession. The notes seized differed in their tenor and amounts, as described in the sheriff's return from that sued on, but were alleged to be the same. This evidence was intended to show that the defendant was prohibited by this seizure, from paying the amount of the note to the plaintiffs. It appeared also that this execution, after the seizure and before any sale, was stayed by the surrender of the defendant, in favor of all his creditors.

The transfer of the note bears date the 30th December, 1831, and on the sixteenth of January following, Segura filed his *bilan* and made a surrender of his property, which was accepted by the judge. The whole of the proceedings of the suit against his creditors, and several judgments obtained against him before, and at the time of the transfer of the note sued on, were offered in evidence, by which it appeared he was completely insolvent.

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The district judge charged the jury, that the note being negotiable, it became the property of the plaintiffs. 2d. The contract is not usurious. Usury is where the debtor contracts to pay more than legal interest; here it is a sale of the note, and may be for a reasonable price. 3d. The plaintiffs were not creditors, and sought no advantage over other creditors. They paid a fair price, which went into the mass of the insolvent's estate; it is then a fair contract, &c.

This charge was excepted to by the defendant, and intervenor's counsel, who also required the judge to charge the jury, that "the plaintiffs should show that due notice of the transfer had been given to the defendant before they could recover; and not having done so, they cannot recover as the seizure of Perrault & Pascal gave them a right of privilege on the notes seized, unless it be shown that a notice of the transfer had been given previous to the seizure." The judge refused to charge the jury as requested, and a bill of exceptions was taken to the entire charge and to the refusal.

There was a verdict and judgment for the plaintiffs. The defendant and intervenor appealed.

Brownson and Lewis, for the plaintiffs.

1. The note sued on was negotiable, was negotiated to plaintiffs for a valuable consideration before maturity, and became their property.

2. The contract by which plaintiffs obtained the note is not usurious. Usury is where the debtor contracts to pay more than lawful interest. Here it was a sale of the note for a fair price, and is valid. *La. Code*, 2423-24. 5 *Com. Digest*, 648-9. 10 *Johnson's Reports*, 195.

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SEGURA.

3. Plaintiffs were not creditors of Louis Segura, and could seek no advantage over other creditors; and the price they paid for the note went into the mass of his estate for the benefit of his creditors. 6 *La. Reports*, 538.

4. If plaintiffs knew that Louis Segura was insolvent, still if they paid a fair price for the note, *not being creditors*, they may recover.

5. No law requires the transferee of negotiable paper to give notice to the debtor.

6. The pretended seizure of Perrault & Pascal, was made after the transfer of the notes, and can give them no rights.

Simon, for the defendants and the intervenor.

Mathews, J., delivered the opinion of the court.

In this case suit was brought by the plaintiffs as assignees of a debt transferred to them by one Louis Segura, on St. Yago Segura, the defendant. The evidence of the debt consisted in certain promissory notes held by the transferor, made payable to him in negotiable form by his debtor. Soon after the transfer, indeed so soon as to raise suspicions of the fairness of his conduct, Louis Segura made a cession of his property, in pursuance of our laws relating to insolvents, and a syndic was appointed to manage the ceded property, who intervened in the present suit, claiming a rescission of the contract by which the plaintiffs became proprietors of the notes in question for the benefit of the mass of creditors of the insolvent, and particularly in favor of a judgment creditor, who had seized, under execution, these notes.

Where the payee of a promissory note, transfers it in writing on the back of the instrument, for 90 per centum discount, it will be considered a sale, not an endorsement; in which the purchaser will be considered as having taken the risk of the solvency of the maker without recourse on the transferor; and such a contract is in its nature aleatory and not annuities.

The original plaintiffs having prevailed in the court below, the intervenor appealed from a judgment which was rendered in their favor.

The facts of the case show that the creditor had sold to the plaintiffs, the notes on which they commenced the present action, at a discount of twenty per cent. The contract of transfer was a sale of them, not a regular transfer by endorsement, leaving the endorser responsible as such. The purchasers seem to have taken the risk of the solvency of the

maker, without recourse on the transferor. The contract was in its nature aleatory, consequently not usurious. There was a mistake in the seizure under execution attempted to be made by the judgment creditor. The sheriff's return shows that he seized notes of an amount different from those transferred to the plaintiffs; the privilege which the creditor might have acquired in consequence of having made the seizure before notice of the transfer, did therefore not attach. The sale having been made for one-fifth less than the amount promised on the face of the notes would probably authorise the creditors of the insolvent to cause it to be annulled, in pursuance of the 1976th article of the Code. But on claiming a rescission, they would be bound to refund to the purchasers the sums paid by them to the insolvent, as there is no evidence of fraud or bad faith on their part. The syndic has not asked a judgment of this kind in the present instance, and it is not shown that the creditors would be willing to take on themselves the responsibility of refunding.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Where the sale of a promissory note by the payee in insolvent circumstances, has been made for *one-fifth less* than the amount promised on the face of it, such sale may be rescinded by the creditors of the insolvent; but they would be bound first to refund the purchase money, when there is no evidence of fraud on the part of the purchaser.

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TOWLES'S AD'X.

vs.

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TOWLES'S ADMINISTRATRIX vs. WEEKS ET ALs.

71. 312

46 1020

71. 312

52 1817

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARY.

Where a succession is administered as an insolvent one, and there are judgment and mortgage creditors, they have the right to demand a forced sale for cash, and in the event of the property not bringing its appraised value, a credit of one year must be allowed.

Where the creditors of an insolvent succession, in which there are minors interested, and who have accepted it with the benefit of inventory, meet and concur with a family meeting, in behalf of the minors, that the property be sold on certain terms and credits, the sale will be legal, and confer a valid title on the purchasers, even if it sell for *less than the appraised value*.

A sound interpretation of the law, in relation to the administration of successions, whether vacant or accepted with benefit of inventory, will in many cases, authorise a departure from the rule, requiring property of minors to bring its appraised value, before it can be sold.

On the death of Dr. John Towles, in 1832, his widow was appointed administratrix of his succession, which was regularly accepted on behalf of his minor children, with the benefit of inventory. The administratrix finding the succession insolvent, petitioned the judge of probates of the parish of St. Mary, to call a meeting of creditors, to fix the terms and conditions on which the property belonging to the succession, was to be sold. The creditors assembled and fixed the terms and conditions of sale, without expressly ordering that the property should not be sold, unless it brought its appraised value.

A few days after, a family meeting was called on behalf of the minors, and advised and authorised the sale on the same terms and conditions, which had been fixed by the creditors. The proceedings of the family meeting, and that of the creditors, were duly homologated. The sale proceeded. The first plantation was appraised to seventeen thousand dollars,

and was adjudicated to the defendants, for fifteen thousand dollars, being a little less than its appraised value. On being called on to comply with the terms and conditions of sale, the purchasers considered it unsafe to comply, until it should be determined that the sale was legal, and the title such as to prevent its being annulled by the minors, on the ground that the property sold below its appraised value.

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VS.
WHEELS ET ALB.

The administratrix took a rule on the purchasers, to show cause why they should not execute their notes, and comply with the terms and conditions of sale.

The defendants showed for cause, that the sale was illegal and their title defective, for the following reasons :

1. The adjudication was illegal, because the property was sold below its appraised value, when the legal heirs of Dr. Towles, who are minors, have rights concerned, and are interested in the property, which cannot be sold below its appraised value.

2. The proceedings in relation to said sale, are in other respects illegal and irregular. They pray that the rule be dismissed, &c.

The judge of probates made the rule absolute, and required the defendants to comply with the terms of sale, or in default thereof, the property would be re-sold on their account. They appealed from this decision.

The principal question on which this case depends, is whether or not, the administratrix of an estate, when the heirs are minors, accepting it with the benefit of inventory, can sell the property belonging to it, below its appraised value ?

Simon, for the plaintiff, contended that the sale was legal and binding on the purchasers. The administratrix had pursued the legal formalities required by law. The Code requires that the curator of an insolvent succession, should call the creditors together, to deliberate on the most advantageous manner of selling the property of the succession. *La. Code*, 1160.

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2. Administrators of insolvent successions, possess the same powers, and are subject to the same duties, as curators of vacant successions. *La. Code*, 1042.

3. The family meeting has advised the sale, on the terms and conditions fixed by the creditors as most advantageous to the minors. This having been done, the property was to be sold for what it would bring.

Bowen, for the defendants.

Two questions present themselves. *First*, will this court decide the validity of the sale to the defendants, under the present proceedings? The cases where the court has decreed payment, notwithstanding a defect of title, was where the contract was perfected, and the dispute arose about its performance. Here it is inchoate, and the purchasers decline it, under the apprehension that it is illegal.

2. The parties on both sides are desirous, that the validity of the contract shall be determined and decided on by the court, and that the question be settled before any further steps are taken.

3. The consequences to the defendants, if compelled to comply with and fulfil their contract, without a decision on their title, would be hazardous. The money would be paid and distributed among many, or perhaps one hundred creditors, and when the minors arrive at full age, they might set aside the sale, and the purchasers lose both the land and the price.

4. This court, in similar cases, has decided on the regularity of the proceedings, and have refused to direct the purchaser to execute his contract, because of irregularities or defects of title. 5 *La. Reports*, 434. 7 *Martin*, N. S. 93. 6 *Martin*, N. S. 659. 5 *Martin*, 625.

5. If the question is not decided on now, the defendants, when called on to pay or execute their notes, will have a right to demand security. 7 *Martin*, N. S. 93.

6. In regard to the main question, the practice is one way, and the law, perhaps, the other. The object of the law, in a sale by the representatives of minors, and in a sale by an

administrator, are essentially different. In the first case, the law requires that the property should be preserved in nature, for the benefit of the minor, unless a sale is absolutely necessary, or evidently advantageous to him; and in the last case, it should be converted into a general fund for distribution.

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7. In the first place, the tutor must represent a family meeting, decide that a sale is advantageous, and the judge homologate the proceedings, before it can be effected. *La. Code*, 334, 335. In the last case, the administrator can exercise no discretion in the matter; he must sell. *La. Code*, 1051, 1055.

8. In the first case, all the formalities which precede the sale, are regulated with care and precision, and the minor's property is not to be sold for less than its appraised value. *La. Code*, 336, 337. In a sale by an administrator, on the contrary, the Code expressly declares, that it prescribes its terms, and no provision exists, that the property to be sold must produce its appraised value. *La. Code*, 1051.

9. In cases where it is necessary, that the property should bring its appraised value, a provision exists for a re-appraisal, in case the first estimation cannot be obtained. Here no such provision exists. What is to be done? *La. Code*, 337.

Mathews, J., delivered the opinion of the court.

This is an appeal taken by the defendants, from a judgment of the court below, rendered on a rule against them, obtained on the part of the plaintiff, to show cause why they should not be compelled to comply with the conditions of the sale of a certain tract of land, adjudicated to them at a probate sale of the succession of the late John Towles, the property purchased being a part of said succession.

The important facts of the case are as follow : John Towles died intestate, leaving a son, a minor, above the age of puberty, by a former wife, and several children, minors, issue of Ann A. Towles, one of the plaintiffs, and also a large estate, in the parish of St. Mary. The surviving wife took

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on herself the administration of this estate, as natural tutrix of her children, and the son of the first marriage, who has claims against his father's succession, is represented by a tutor, regularly appointed for that purpose. The tutrix, having discovered, that her husband was largely indebted, at the time of his death, to various persons, amongst whom there were creditors by judgments and mortgages, applied to the Court of Probates, to have a meeting of the creditors cited, which was acquiesced in, by the tutor of John T. Towles, the son above alluded to. A meeting of the creditors took place, and in their deliberations, they agreed to the sale of the property now in question, on a credit of one, two and three years, payable by instalments, the purchasers to give notes with surties, to secure the payment of the price. These terms of sale, were in conformity to the decisions of family meetings, which had taken place in relation to the interests of the minors, touching the succession of their father, which had been regularly inventoried and appraised. In the inventory, the tract of land forming the basis of the present dispute, was appraised to seventeen thousand dollars, but at the adjudication ordered, as above stated, was sold to the defendants, as the highest and last bidder, for fifteen thousand dollars. They afterwards refused to comply with the terms of sale, alleging that they would not acquire a clear and indefeasible title to the property bought, as the future claims of the minor children of the intestate would not be concluded, the property not having brought the full amount of its appraisalment.

The legal question arising out of these facts, requires a decision of the court, by which it is to be ascertained, whether our jurisprudence creates any exception to the general rule established by law, which orders, that the property of minors cannot be sold for less than the amount of the appraised value mentioned in the inventory, &c. *La. Code, art 337.*

It is expressly stated, in the article 339, that the prohibition of alienating the immovables and slaves of a minor, does not extend to a case in which a judgment is to be executed against him, or of a licitation made at the instance

Where a succession is administered as an insolvent one, and there are judgment and mortgage creditors, they have the right to demand a forced sale, for cash, and in the event of the property not bringing its appraised

of a co-heir, or other co-proprietor. Here we find a specific exception recognised by law, to the general rule.

If resort be made to the Code of Practice, we find the articles 990 and 991, containing provisions authorising creditors of vacant estates to pursue the succession, and force a sale at a credit of one year, and according to the article 992, "the principles contained in the two preceding articles, apply to all successions accepted with the benefit of inventory, whether the heirs are minors or of full age, and to all successions administered by administrators."

The circumstances of the present case, do not bring it within the express provisions of these articles, but the measures adopted by the parties, seem to us to be more favorable to the heirs of Towles's succession, than a strict pursuance of the letter of the law. It is administered as an insolvent estate, and there being creditors by judgments and mortgages, they might have forced a sale for cash, and in the event of the property not selling for its appraised value, a credit of only one year could have been obtained. The creditors have, however, consented to more favorable terms, by permitting a sale on a credit of one, two and three years,

We are inclined to think, that a sound interpretation of all the provisions contained in our legislation, in relation to the administration of successions, whether vacant or accepted with benefit of inventory, will in many cases authorise a departure from the rule, which requires the property of minors to be sold for not less than its appraised value. Perhaps this rule would not be binding on the administrators of any succession administered as insolvent.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, at the costs of the defendants.

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value, a credit of one year must be allowed.

Where the creditors of an insolvent succession, in which there are minors interested, and who have accepted it with the benefit of inventory, meet and concur with a family meeting, in behalf of the minors, that the property be sold on certain terms and credits, the sale will be legal, and confer a valid title on the purchasers, even if it sell for less than the appraised value.

A sound interpretation of the law, in relation to the administration of successions, whether vacant or accepted with benefit of inventory, will in many cases, authorise a departure from the rule, requiring property of minors to bring its appraised value, before it can be sold.

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APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
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The purchasers of a debt or claim at sheriff's sale, stand in the same relation to the person who owes it, as the creditor of the latter would, or did before the sale; and whatever defence would avail the original debtor against his creditor, is equally valid against his vendees or purchasers.

Where a person assigns and transfers a surety debt for a consideration expressed therein, subrogating his assignee to all his rights, and authorising him to recover the debt by all legal means: Held, that a discharge given by the assignee to the original debtor, in pursuance of the assignment, was valid against the assignor and his vendees, even when the debt was not novated by the assignment, and never paid to the assignee.

Parole evidence is *inadmissible* to prove a verbal agreement to cancel a sale of slaves, or to establish or destroy title to slaves.

Parole evidence is *admissible* to prove collateral facts, such as that the seller took back certain slaves from the purchaser, and had them in possession with the consent of the latter, in consequence of redhibitory defects, and to avoid litigation.

This case has been once before in this court. It was decided against the plaintiffs on the ground that they had purchased a debt due by a *surety* which could not be legally sold. See the facts of the case reported in 3d La. Reports, 48.

On the return of the case, the debt was re-sold and the suit commenced *de novo*. The debt was sold and purchased by the plaintiffs under the following description, as advertised by the sheriff. "All the right, title, interest and demand which John Andrus (the defendant in said suit) has, in and to a certain debt, contracted by Stephen Brown, as principal, and Hypolite Chretien as his security, with, and to said John Andrus, and the heirs of Charlotte Hanchette, his deceased wife at the sale of the estate, in community between the aforesaid Andrus and the said heirs, &c., at which sale,

Stephen Brown became the purchaser of lot No. 23, in the *procès verbal* of said sale, consisting of four slaves, for the sum of three thousand four hundred and sixty dollars with interest, &c., and a mortgage on the property sold to secure the purchase money, for the payment of which aforesaid sum, &c., to the said John Andrus, and the heirs aforesaid, the aforesaid Hypolite Chretien became the security of the aforesaid Stephen Brown, and with him signed the *procès verbal* of said sale." The sale was made on the 7th January, 1832, and the plaintiffs, in the execution against John Andrus became the purchasers, for the sum of sixty-seven dollars, being two thirds of the appraised value. The purchasers received the sheriff's deed according to the terms of sale. They then instituted this suit against the defendant, as the surety of the debt, in May, 1832, and pray judgment against him for amount thereof with interest.

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The defendant pleaded a general denial; that the debt sold, purports to be owing by a person who lived and died in the parish of St. Martin, which could not be seized and sold by the sheriff of St. Landry; that the succession of Stephen Brown the principal debtor, is not represented, the curator being *functus officio*, and was so long before the seizure and sale of this debt; that John Andrus took back the negroes purchased by Brown, in his life-time, and cancelled the sale and obligation which the defendant signed as surety; and that no inventory was ever made of the slaves, as making part of Brown's succession, after his death; that afterwards John Andrus assigned this debt to Luke Lesassier, and subrogated the latter to all his rights in the same; and who, to make a legal title to the slaves, obtained a judgment by consent with the curator of Brown's succession, had the negroes seized and sold, and purchased them in, in full satisfaction of the original debt; that Lesassier as the assignee of Andrus, gave him (defendant) a full acquittance and discharge from all liability as the surety of Brown, on account of said debt. He finally pleads the prescription of three, five and ten years, and charges fraud in Andrus and Lesassier, and that the plaintiffs purchased said claim with full notice of all these facts and circumstan-

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ces, and at their own risk; and that they have no rights that Andrus did not possess, who had transferred and cancelled the debt, consequently they cannot recover.

The evidence showed, that on the 29th January, 1820, all the estate in community between John Andrus, and the heirs of his deceased wife, was sold at probate sale, and one Stephen Brown purchased lot No. 23, consisting of four slaves, for three thousand four hundred and sixty dollars bearing interest, with H. Chretien his surety; the slaves remaining mortgaged until payment. Brown took the negroes to the parish of St. Martin. And shortly after, finding some of them afflicted with redhibitory defects, (as Brownson, defendant's witness states) intended to bring an action to rescind the sale, and employed witness for that purpose. That Lesassier who represented Andrus, was to examine the slaves, and if found defective, the sale was to be annulled and cancelled. On examination it was agreed between the parties, that the sale should be cancelled; and a few days afterwards the slaves were sent to Andrus, near Opelousas, but before any thing was done, Brown destroyed himself, which prevented any act being passed, cancelling the sale. The negroes remained in possession of Andrus, until suit was brought against Brown's succession in the Probate Court.

Things remained in this situation, when on the 7th May, 1825, John Andrus, to whom the debt was due, transferred it to Luke Lesassier, by notarial act, in the following terms: "That H. Chretien, became surety for Brown, in the purchase aforesaid, and signed the *procès verbal* of sale, which sum of money (three thousand four hundred and sixty dollars) has never been paid, &c. Whereas the said John Andrus is justly indebted to L. Lesassier, in the sum of one thousand two hundred and fifty dollars, with interest, &c. Now, therefore, I the said John Andrus, do assign, transfer and set over to the said L. L., all the debt of three thousand four hundred and sixty dollars, subrogating him to all my rights therein, as well those resulting from the mortgage aforesaid, hereby authorising the said L. L., by virtue of this assignment and transfer, to proceed and recover the said sum of

money from the said Brown, his heirs or executors, or his surety, H. Chretien, by all legal means; as also to proceed by hypothecary action against said slaves, so purchased, as aforesaid; and the said L. L., accepting this assignment and transfer, doth promise to return and pay over to said John Andrus, all sums of money which may come into his hands, in virtue of this transfer, over and above the sum of one thousand two hundred and fifty dollars, as aforesaid." Signed before a notary and two witnesses, by Andrus and Lesassier.

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Brown having died, John Brownson was appointed curator of his vacant succession, the 20th March, 1824. In May, 1827, Lesassier instituted suit in the Probate Court for the parish of St. Martin, against the curator of Brown's succession for the amount of said debt. Brownson, as curator, pleaded the general issue to the action.

Brownson, in his testimony, swears, that he then stated to Lesassier, that the suit could not go on without the matters of taking back the negroes, by Andrus, on account of redhibitory defects, were set up in defence. It was then agreed, verbally, between them, that judgment should go against Brown's estate, simply in order to obtain a title to the negroes, so that he might get the proceeds of any sale he might make of them, and the judgment was rendered for this purpose. That on the 15th May, 1827, he took an agreement to this effect, &c. On the 28th May, 1827, Lesassier had judgment for the sum of three thousand four hundred and sixty dollars and interest, ordering that the negroes purchased by Brown, be seized and sold, to satisfy the same. In June following, the negroes were sold under an execution, issuing on said judgment, to the parish of St. Landry, and Lesassier became the purchaser for one thousand and eighty dollars.

After instituting the above suit, Lesassier gave Brownson the following written instrument, alluded to in the testimony of the latter:

"Whereas suit has been instituted by me, against J. Brownson, as curator of the succession of Stephen Brown, for the purpose of obtaining a judgment which shall authorise the seizure and sale of certain negroes, bought by the said

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71 812
46 1020
71 812
52 1917

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARY.

Where a succession is administered as an insolvent one, and there are judgment and mortgage creditors, they have the right to demand a forced sale for cash, and in the event of the property not bringing its appraised value, a credit of one year must be allowed.

Where the creditors of an insolvent succession, in which there are minors interested, and who have accepted it with the benefit of inventory, meet and concur with a family meeting, in behalf of the minors, that the property be sold on certain terms and credits, the sale will be legal, and confer a valid title on the purchasers, even if it sell for *less than the appraised value*.

A sound interpretation of the law, in relation to the administration of successions, whether vacant or accepted with benefit of inventory, will in many cases, authorise a departure from the rule, requiring property of minors to bring its appraised value, before it can be sold.

On the death of Dr. John Towles, in 1832, his widow was appointed administratrix of his succession, which was regularly accepted on behalf of his minor children, with the benefit of inventory. The administratrix finding the succession insolvent, petitioned the judge of probates of the parish of St. Mary, to call a meeting of creditors, to fix the terms and conditions on which the property belonging to the succession, was to be sold. The creditors assembled and fixed the terms and conditions of sale, without expressly ordering that the property should not be sold, unless it brought its appraised value.

A few days after, a family meeting was called on behalf of the minors, and advised and authorised the sale on the same terms and conditions, which had been fixed by the creditors. The proceedings of the family meeting, and that of the creditors, were duly homologated. The sale proceeded. The first plantation was appraised to seventeen thousand dollars,

Garland, for the plaintiffs.

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1. The testimony of Mr. Brownson is inadmissible, as he was, at the time of giving it, the curator of Brown's estate; also, because it goes to prove a parole agreement to rescind a sale of slaves. The testimony of Moore is also inadmissible, being liable to the last objection to Brownson's evidence. The same objection applies to all that portion of Mr. Simon's testimony, relative to the rescission of the sale. 3 *Martin*, 486. 4 *Martin*, N. S. 212.

2. All the right, title or interest, which John Andrus had in or to the claim against Brown's estate, or against the defendant as the surety of Brown, is now vested in the plaintiffs, by virtue of the sheriff's sale, made under the execution issuing out of the Probate Court of St. Landry, in the suit of the present plaintiffs, against John Andrus. And unless the defendant can show he is discharged, the plaintiffs must recover.

3. The first objection cannot be sustained. The execution under which plaintiffs purchased, was against John Andrus. He resided in St. Landry, and the evidence of the debt was of record in the office of the judge of that parish. It would not have been legal to have sent the execution to the parish of St. Martin, where Brown's succession was opened. *Code of Practice*, art. 642.

4. The sale is not void in consequence of the service of the notice of seizure. In the first place it was not necessary to have given any notice of the seizure, to Brown's curator, or to Chretien, but if it was, it has been done legally. A notice was served on Chretien, by the sheriff of St. Landry, and one on Brownson, as Brown's curator, by the sheriff of St. Martin, and defendant is now estopped from saying Brownson was not the curator, as he has given in evidence two documents, in which the character of curator is taken, both of which bear date subsequent to the seizure.

5. No agreement to rescind a contract of sale of slaves can be proven by parole evidence, though accompanied by possession. But if any such contract ever was made, which is not admitted, it appears from the evidence, it was the inten-

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tion of the parties to reduce it to writing, which was never done ; therefore, either party had a right to retract, and John Andrus did retract, as is conclusively established. 1 *Martin*, N. S. 420, and the authorities there cited. 3 *Martin*, 486, and 4 *Martin*, N. S. 212.

6. There is no evidence of any fraud practised by John Andrus or Lesassier, on Brownson, as Brown's curator. But if there was, it would not avail the defendant any thing. He alleges the effect of the fraud, was to prevent Brown's curator from pleading the redhibitory defects of the slaves in the suit Lesassier instituted against him. Suppose for a moment it was so, in what way can it benefit the defendant ? No fraud has been practised on him, and he, as Brown's surety, has a right to set up all the exceptions and defences that Brown or his curator might have pleaded, yet he has not in his answer said one word about the redhibitory defects of the slaves. Is not the conclusion therefore irresistible, that no such defects existed, and that all the allegations about fraud, were thrown into the answer, for the purpose of getting parole evidence admitted of an agreement to rescind the sale ?

7. The judgment of Lesassier against Brown's curator, was not rendered by consent. The record of that suit shows directly the reverse. An answer is filed, denying all the allegations in the petition, and the judgment states, that it was rendered upon full proof of the allegations contained in the petition, and after hearing the parties.

8. The instrument by which this claim was transferred, by Andrus to Lesassier, is not an *act of transfer*, but a *procuration*. If it be a transfer, it is only for the portion that was due to Lesassier by Andrus, viz : the sum of one thousand two hundred and fifty dollars. Lesassier was in fact nothing more than the mandatory of Andrus, to collect this debt and pay over the balance, after deducting what was due to him by the latter.

9. The mandatory or mere attorney in fact, has no authority to release a debt, or make a donation of a claim or debt of his principal without consideration, consequently the releases and acquittances of Lesassier, executed to the defend-

ant and the curator of Brown, are null and void. *Pothier*, WESTERN DIST. September, 1834.
Contrat du Mandat, vol. 6, p. 87, §2. *Ib.* p. 103, ch. 2, No. 53.

10. The act under which Lesassier transacted this business, has all the forms and requisites of a procuration. *La. Code*, 2955, 2966. ANDRUS ET AL.
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11. The attorney in fact or mandatory, has the right to retain, out of the sum in his hands, all sums necessary to cover his costs and expenses, and even to offset a debt owing to him by his principal. This was precisely the case of Lesassier and Andrus. *La. Code*, 2992.

12. But even if this be a transfer of the debt from Andrus to Lesassier, it is only in trust for the portion over the sum due to Lesassier, and the trustee cannot release the debtor without full consideration. In any view we take of the case, the plaintiffs must recover at least the surplus of this claim, beyond the amount of Lesassier's debt on Andrus.

Simon and Brownson, for the defendant.

1. The sale of this debt was illegal. The principal debt existed against Brown's estate, in the parish of St. Martin, but the execution issued, and the sale took place in the parish of St. Landry. *Code of Practice*, art. 642.

2. The seizure and sale are void, because Brown's estate was not represented. The curator was *functus officio*, and had never been re-appointed.

3. The act of transfer from Andrus to Lesassier, was sufficient to invest the latter with the complete ownership of this debt; and authorised him to dispose of it as he thought proper. *Pothier, Vente*, No. 550, 558, 574-5-6-7.

4. Being the legal owner of this debt, Lesassier had the right to give a release of it. He has done so to the defendant Chretien, who is the surety, and now completely discharged from his suretyship.

5. The object of this transfer was for the particular purpose of giving effect to a previous verbal agreement, relative to the cancelling of the sale of certain slaves to Brown, which had been taken back. Lesassier effected this object by obtaining a judgment against Brown's succession, by consent,

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and having the slaves sold under it to perfect the title to them, by divesting Brown's estate of it. Lesassier purchased the slaves, in this way, for the whole debt. In doing this, he acted in accordance with his mandate from Andrus. This mandate was of the fullest extent, and contained the most ample powers. *Pothier Mandat, No. 144-5-6, &c.*

Bullard J., delivered the opinion of the court.

The plaintiffs sue as owners, by purchase at sheriff's sale, of a debt, alleged to be due by the estate of Stephen Brown, and the defendant, his surety. They show that Brown purchased, at the public sale of the estate of their mother, in community with their father, a certain lot of slaves, and that Chretien became his surety for the payment of the price; that having obtained a judgment against their father, as tutor, they levied their execution on that debt, and it was adjudicated to them.

The defendant pleads, among other exceptions, not now necessary to notice, that at the time of the seizure of the debt by the plaintiffs, it was not the property of John Andrus, their debtor, but had been assigned and transferred to Luke Lesassier, who had given, both to the defendant and the estate of Stephen Brown, a full discharge, to the knowledge of the plaintiffs themselves; that soon after the sale of the slaves to Brown, and previously to the assignment of the debt to Lesassier, John Andrus had taken back the slaves, under a verbal agreement to cancel the sale, on account of certain redhibitory defects; and that he retained possession of them, until they were sold by the sheriff of St. Landry, to satisfy a judgment, recovered by Lesassier in his own name, as assignee, against the vacant estate of Brown; that the judgment so recovered, was rendered by consent, upon a written agreement of Lesassier, with the curator of the estate, that the same should be used, for the sole purpose of divesting the estate of the legal title in the slaves, in pursuance of the verbal agreement, although the estate had a good defence to the action; and that the slaves were sold and bought in by Lesassier, in satisfaction of the judgment,

thereby carrying into effect the original agreement, all which was done with the knowledge and consent of John Andrus. The respondent further alleges, that all these proceedings were carried on, without any notice to him, as surety of Brown, and that thereby it is no longer in the power of John Andrus, to subrogate *him* in his rights and actions against Brown. He further alleges, that afterwards in 1827, Lesassier, in pursuance of the same agreement, gave him a full and complete discharge. He further says, that an attempt, now to make him liable for this debt, is owing to the fraudulent conduct of Lesassier and John Andrus; that Brown, and afterwards John Brownson, Esq., the curator of his estate, acted in good faith, and that all the transactions took place, in consequence of the fraudulent representations of Andrus and Lesassier, while fraud was used to deprive the estate of Brown of the legal right, to have the sale cancelled, to obtain a fraudulent title to the slaves, and of compelling the purchaser afterwards to pay the price. He further alleges, that the plaintiffs, when they purchased the claim, had due notice of all the equitable defences in his favor,

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It may be assumed as undeniable, that the plaintiffs have no greater rights than John Andrus, and that whatever defence would avail the defendant against him, is equally valid, against those who stand in his rights. We will, therefore, consider the defence, as if John Andrus was himself the plaintiff in this action.

The first question which presents itself, is the validity of the final discharge, given by Lesassier to the defendant, and that depends on the question, whether by the assignment from Andrus to him, the latter was the absolute owner of the debt. The assignment recites the purchase of the slaves by Brown, and the suretyship of Chretien, as well as the terms and conditions of the sale. It then goes on to say, that John Andrus, being indebted to L. Lesassier, in the sum of twelve hundred and fifty dollars, with interest, at the rate of ten per cent., from that date, "now I, the said John Andrus, do assign, transfer and set

The purchaser of a debt or claim at sheriff's sale, stand in the same relation to the person who owes it, as the creditor of the latter would, or did before the sale; and whatever defence would avail the original debtor against his creditor is equally valid against his vendee or purchasers.

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THEREOF PRESIDING.

The purchasers of a debt or claim at sheriff's sale, stand in the same relation to the person who owes it, as the creditor of the latter would, or did before the sale; and whatever defence would avail the original debtor against his creditor, is equally valid against his vendees or purchasers.

Where a person assigns and transfers a surety debt for a consideration expressed therein, subrogating his assignee to all his rights, and authorising him to recover the debt by all legal means: Held, that a discharge given by the assignee to the original debtor, in pursuance of the assignment, was valid against the assignor and his vendees, even when the debt was not novated by the assignment, and never paid to the assignee.

Parole evidence is *inadmissible* to prove a verbal agreement to cancel a sale of slaves, or to establish or destroy title to slaves.

Parole evidence is *admissible* to prove collateral facts, such as that the seller took back certain slaves from the purchaser, and had them in possession with the consent of the latter, in consequence of redhibitory defects, and to avoid litigation.

This case has been once before in this court. It was decided against the plaintiffs on the ground that they had purchased a debt due by a *surety* which could not be legally sold. See the facts of the case reported in *3d La. Reports*, 48.

On the return of the case, the debt was re-sold and the suit commenced *de novo*. The debt was sold and purchased by the plaintiffs under the following description, as advertised by the sheriff. "All the right, title, interest and demand which John Andrus (the defendant in said suit) has, in and to a certain debt, contracted by Stephen Brown, as principal, and Hypolite Chretien as his security, with, and to said John Andrus, and the heirs of Charlotte Hanchette, his deceased wife at the sale of the estate, in community between the aforesaid Andrus and the said heirs, &c., at which sale,

interest, those releases recite, and are based on such considerations and accompanied by such facts, as to conclude John Andrus himself?

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We cannot better illustrate our views of this part of the case, than by supposing, that John Andrus had sued Lesassier, to recover the balance of the debt, over and above the twelve hundred and fifty dollars, and we were called on to consider, how far the latter could justify himself in relation to his principal, for having executed those releases. Might he not say to his adversary, if you consider me, in relation to that matter, merely as your agent, under what circumstances was that agency created? At the time you authorised me to prosecute for that claim, were you not in possession of the slaves, under an agreement, verbal if you will, but still an agreement binding on you, that the sale should be rescinded? Did you not take back the slaves, with a knowledge that they were *unsound*, and that Brown had a valid defence? Can it be supposed, that you intended to prosecute for the whole amount of the claim, which you admitted would be unjust? Did you not refer Mr. Chretien to me, as charged with the whole business, asserting at the same time, that he was released? You either intended to deceive me, and cannot now profit by your own wrong, or to make me the instrument, by which Brown and Chretien should be defrauded, by disarming them of a just defence, and then holding them to their full responsibility, notwithstanding both your acts and mine?

It is not necessary for us to say, how far such a defence would avail Lesassier in the case supposed, sustained by the evidence in this record. But we are to inquire how far a similar defence, now set up by Chretien, under the same evidence, ought to avail him. Two instruments are produced by him, signed by Lesassier as assignee. By the first, between him and the curator of Brown's estate, it is recited, that suit had been brought by him, for the purpose of obtaining a judgment, which would authorise him to seize and sell the slaves in question, the sale having been previously cancelled, by verbal agreement between Brown and

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Andrus, and he engages that the judgment shall never be used for any other purpose. In consequence of the agreement, the curator forbore to set up the legal defence, put in one merely nominal, and suffered judgment to go. In pursuance of that judgment, the slaves then in possession of John Andrus, in the parish of St. Landry, were sold by the sheriff, and purchased by Lesassier.

The second is a release, executed by Lesassier as assignee, in favor of the defendant Chretien, in which he declares, that having obtained the judgment above mentioned, merely to obtain a title, by which the slaves could be sold, he gives Chretien as full and complete a discharge, as if the debt had been paid.

Were these releases purely gratuitous, or were they founded on considerations, which make them conclusive upon John Andrus? The defendant as surety of Brown, having a right to plead all the exceptions of which the principal might avail himself, except those merely personal, the two agreements must be taken and considered together, in their legal effects. It results from both of them, that as the obligation of Brown to pay, was, to say the least of it, doubtful, in consequence of the defects of the slaves Andrus had taken them back; that in consequence of the death of Brown, in the mean time, it became impossible to cancel the sale by agreement, and that to avoid the delay and trouble of restoring them to the estate, and proceeding directly to have the sale cancelled judicially, his agent or assignee had resorted to the means above related, as a species of machinery, by which Brown's estate should be divested of the title. John Andrus profited by this agreement, to a certain extent; he enjoyed the labor of the slaves without interruption, from within a short time after the original sale, up to the sheriff's sale, under the judgment; he avoided perhaps a tedious litigation, and the hazard of paying the costs and expenses of an expensive law suit, if Brown's succession had insisted on its legal defences.

But it is said this defence rests mainly on parole evidence, which was received, subject to all legal exceptions, and that

it was clearly inadmissible to prove a verbal agreement, to cancel a sale of slaves. Undoubtedly parole evidence is inadmissible, to establish or destroy title to slaves. This is a principle too well settled to admit a doubt, and if the title to the slaves in question, depended on this evidence, it would be entirely disregarded. But the question here, is not whether Brown's estate was divested of title, by virtue of the agreement, or whether the slaves became thereby the property of Andrus. We think the parole evidence admissible to prove, as collateral facts, that Andrus was in possession of the slaves at least; that he was in possession with the consent of Brown; that he had examined the negroes, and was convinced they were defective; that he declared to the attorney of Chretien, that he had the slaves, and that he considered Chretien discharged, and referred him to Lesassier, as charged with the whole business; that a redhibitory action, as stated by Mr. Brownson, was about to be brought by Brown, soon after his purchase; and that he *desisted* from bringing the suit, in consequence of Andrus taking back the slaves, after inspecting them in company with him and his own attorney, who were convinced of the fact, that the defects did exist.

With this view of the case, one of two conclusions seems to us inevitable, either that the intention of John Andrus and Lesassier, were fair and honest, and that the steps taken by them, either separately or together, were intended merely to divest the estate of Brown, of the legal title to the slaves, by the only means which remained, without any expectation of claiming the debt; or that the acts of both were calculated, if not designed, to deprive Brown, and consequently Chretien, of a just legal defence. More than fourteen years have elapsed since the purchase, and seven since the release given by Lesassier. Soon after the purchase, the slaves were taken back, and were never afterwards in possession of Brown, and these acts were accompanied by the declaration, that Chretien was discharged. We think ourselves bound to adopt that hypothesis, which comports with the good faith and honor of the parties concerned, and to say, that the acts

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Parole evidence is *admissible* to prove collateral facts, such as that the seller took back certain slaves from the purchaser, and had them in possession with the consent of the latter in consequence of redhibitory defects and to avoid litigation.

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done, were in pursuance of an intention to cancel the contract, and to release the defendant, rather than that which would present them, in relation to him, as concurring in a series of acts, productive of the most gross injustice. Believing, therefore, that John Andrus himself, would not be entitled to recover, the present plaintiffs can have no better right.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

REPORTS
 OF
CASES ARGUED AND DETERMINED
 IN
THE SUPREME COURT
 OF
THE STATE OF LOUISIANA.

WESTERN DISTRICT.
ALEXANDRIA, OCTOBER, 1834.

COMPTON ET ALS. vs. PEARCE.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE
OF THE SEVENTH PRESIDING.

A party who propounds interrogatories to be answered *in open court*, but neglects to have a day fixed on which the adverse party is to answer, waives his right to have them taken *pro confesso* if they be not answered. WESTERN DIST.
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 Either party has the right of having his interrogatories answered in open court, and in his presence. No order of court is necessary, as it is a right the law gives. COMPTON ET ALS.
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The Code of Practice requires the answer to be made when both parties are in court; and as the answer is for the benefit of the party propounding it, he should take the means required by law, and have the day fixed.

The plaintiffs instituted suit on several promissory notes, executed by the defendant, amounting to the sum of two thousand three hundred and sixteen dollars fifty nine cents, with interest thereon, at ten per cent. per annum, from the several periods when said notes became due, until paid.

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The defendant avers that the notes sued on, were given as part of the price of four hundred arpents of land; and that the quantity of land sold is ascertained to be less, by nearly two hundred arpents, than that purchased. He further states, that he has already paid more than the *pro rata* portion of what land remains, the difference of which he is entitled to demand in reconvention. He prays for an order of survey, to ascertain the precise quantity of land he has received, and for a diminution of price in proportion to the deficiency in quantity.

The defendant annexed several interrogatories to his answer, to show the notes sued on were given for part of the price of four hundred arpents of land, and to prove several payments. He required the plaintiffs to be ruled, to answer the interrogatories *in open court, and on oath*. He annexed his affidavit that the answers of the plaintiffs, to his interrogatories were material.

"Upon which the court ordered, that the foregoing interrogatories should be answered."

The deed of sale to the defendant, expressed the price and consideration of the land alleged to have been purchased, to be five thousand dollars, which sum is acknowledged to have been paid in hand at the time of the contract.

No day being fixed to answer the interrogatories, the plaintiffs did not answer them. The district judge rendered judgment for the plaintiffs for the sum claimed, with interest and costs. The defendant appealed.

1. *Winn*, for the plaintiffs, contended, that the defendant had propounded certain interrogatories to be answered by the plaintiffs, and obtained an order, but fixed no day on which to have them answered. They must now be considered as a nullity and cannot be taken as confessed. His right to have them answered is waived by this omission. *Code of Practice*, 351, 2 *La. Reports*, 72.

2. The act of sale to the defendant of the land in question, shows it was made for cash. It contradicts the defence set up, that it was made on a credit and must prevail.

Boyer & Barry, for the defendant; showed that the plaintiffs sold to the defendant, four hundred arpents of land, for which the latter bound himself to pay a full price and consideration; but has since ascertained that near half the quantity purchased, is covered by an adverse claim, which entitles him to a large deduction from the price agreed on.

2. The court ordered the interrogatories to be answered; and the plaintiffs were bound to have the day fixed, on which they should make their answer in open court, in obedience to the order.

3. The plaintiffs having failed to answer the interrogatories as required, they must be taken as confessed by them.

Martin, J., delivered the opinion of the court.

A single question is presented to the court in this case, viz: whether a party who propounds interrogatories, and requires them to be answered *in open court*, but neglects to apply to the judge to have a day named on which they are to be answered, waives his right to have them taken *pro confesso*, if they be not answered.

This question was solved in the affirmative, in the case of *Stewart vs. Carlin*, 2 *La. Reports*, 72.

The only difference which exists between that case, and the present is, that the prayer in the first for the interrogatories to be answered in open court, was not acted upon by the court, while in the case before us, the court ordered the interrogatories to be answered.

It appears to the court, that the difference does not authorize a distinction. Either party has the right of having his interrogatories answered in open court, and in his presence, if he requires it. No order of court is required to entitle him to a right which the law gives him absolutely. The obligation of the party to whom the interrogatories are propounded to answer them in open court, is not increased by the order. It is, therefore, clear, that a useless order cannot distinguish the case in which it is made, from one in which it is not made.

The counsel of the appellant have, however, requested us to reconsider the decision in the case cited, as it stands alone

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A party who propounds interrogatories to be answered *in open court*, but neglects to have a day fixed on which the adverse party is to answer, waives his right to have them taken *pro confesso* if they be not answered.

Either party has the right of having his interrogatories answered in open court, and in his presence. No order of court is necessary, as it is a right the law gives.

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as a solitary one. He has urged upon the court, that the *Code of Practice*, art. 351, requires, indeed that the interrogatories which are required to be answered in open court, should be answered on the *day appointed to that effect by the judge*, but it does not make it the duty of the party interrogating to provoke the appointment of the day. He has insisted that it is the duty of the party who is required to answer, to provoke such an appointment, which he considers is made for the convenience of the party called on to answer.

The Code of Practice requires the answer to be made when both parties are in court, and as the answer is for the benefit of the party provoking it, he should take the means required by law, and have the day fixed.

As the Code requires that the answers shall be made at a time when *both* parties are present in court, it appears to this court, that the convenience of neither is to be consulted exclusively. The answer is for the benefit of the party interrogating, otherwise he would not require it. If it be for his benefit, and he has an interest to obtain it, it is but fair he should take the means required by law to obtain it.

This court on a reconsideration of the case of *Stewart vs. Carlin*, sees no reason to be dissatisfied with the decision then made, and we do not think the District Court erred, in deciding in conformity with it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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WALSH
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WALSH VS. WELLS.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE
OF THE SEVENTH PRESIDING.

The holder of a promissory note, payable to order, and endorsed in blank by the payee, is entitled to recover on it; it being in the nature of a note payable to bearer.

A claim on a commercial firm, cannot be pleaded in compensation, or set off to a demand by one of the partners, against the defendant.

This action is instituted on the following promissory note, signed by the defendant :

“ Alexandria, April 2d, 1826.”

“ On the first day of January next, I promise to pay, to the order of James Armor, eight hundred and twelve dollars, value received, payable at the Bank of Orleans.”

“ Montford Wells,”

Endorsed. “ James Armor,”

“ *per pro* Samuel P. Morgan.”

“ John Walsh.”

The note was duly protested for non-payment,

The record shows, that in March, 1830, Samuel P. Morgan brought suit on this note, against the present defendant. The latter excepted to the action, alleging that Morgan was dead at the inception of the suit. In April term, 1830, the suit was dismissed, it appearing the plaintiff was dead.

At the April term, 1831, the present suit was instituted, in the name of the present plaintiff, who appears to have endorsed the note, in the name of S. P. Morgan, as his attorney in fact. He alleges in the petition, that *said note was endorsed to him by the said Armor, previous to the maturity thereof*; he prays judgment for the amount of the note, with legal interest and costs.

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vs.
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The defendant denies, that the plaintiff is the owner of the note sued on, but that it belongs to the late firm of S. P. Morgan & Co., and prays to be dismissed. He further charges, that the firm of S. P. Morgan & Co., to whom the note belongs, owes him one thousand four hundred and thirty dollars, for a note of Robert Martin and James Bowie, dated 17th January, 1826, payable one year after date, which the said firm, then holding his note, received to collect and account for to him, but which they have failed to do, so that they have become liable to him for the amount thereof. He prays that the demand be rejected, and that the plaintiff be ruled to answer *on oath*, whether the firm of S. P. Morgan & Co., was not composed of S. P. Morgan and John Walsh, the present plaintiff? He alleges, that the plaintiff was a member of said firm, and bound in *solida*, to account for said note to him.

At the April term, 1832, the court ordered the interrogatory set up in the answer, *to be answered*. At the spring term, in 1833, no further steps having been taken in this cause, judgment was rendered in favor of the plaintiff, for the amount of the note sued on, with interest and costs.

The receipt of *S. P. Morgan & Co.*, dated March 17th, 1828, for Martin & Bowie's note of one thousand four hundred and thirty dollars, was offered in evidence by the defendant, in which they say, "*when collected, we promise to account for, to Mr. Montford Wells.*" The plaintiff's counsel objected to the admission of this paper, in evidence, but it was received by the court, and a bill of exceptions taken to its admission. The plaintiff had judgment for the amount claimed, rejecting the demand set up in the defence. The defendant appealed.

Thomas, for the plaintiff.

1. This suit is brought on a promissory note, payable to order, and endorsed in blank. Suit was first instituted by S. P. Morgan, a member of the firm of Morgan & Co., to whom it was transferred by the endorsement. Morgan died, and the suit was dismissed. The present holder now seeks to recover on it.

2. The present plaintiff is entitled to recover, as the legal and *bonâ fide* holder of the note, which being negotiable and endorsed in blank, passed into his hands by delivery.

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Boyce, contra.

1. The plaintiff cannot maintain his action on this note, when the evidence shows it is the property of Morgan & Co. Morgan, it is shown, died before the transfer, and no legal transfer has been made of it since.

2. Walsh, the present plaintiff, should have sued as surviving partner of Morgan & Co., and not in his individual right. Not being the owner of the note, he cannot recover.

3. The note of Martin & Bowie, which Wells gave to Morgan & Co., and now set up in compensation and reconvention, must be accounted for, and allowed as an offset to the plaintiff's demand.

Thomas, in reply, contended that the blank endorsement of Armor, to whom the note was made payable, authorised the plaintiff to sue in his own name. He had the right to strike out the endorsement of S. P. Morgan & Co., and fill up the endorsement to himself.

2. The holder of a promissory note, endorsed in blank, who is not alleged to be in the wrongful possession of it, may fill up the endorsement to himself, and sue in his own name. The plaintiff then has an undoubted right to recover.

Martin, J., delivered the opinion of the court.

The defendant resists the plaintiff's action on a promissory note, by a denial of his right to sue, and on an allegation, that he had a claim on a commercial firm, of which the plaintiff was a member, for the amount of a note, which he had given for collection, and which was unaccounted for. He contends the amount of this note must be allowed, in compensation of the note sued on.

The plaintiff had judgment, and the defendant appealed.

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The holder of a promissory note, payable to order, and endorsed in blank by the payee, is entitled to recover on it; it being in the nature of a note payable to bearer.

In support of the first ground of defence relied on, the defendant refers to the blank endorsement, made by the plaintiff, as attorney in fact of Morgan, and to the record of a suit brought by Morgan, on the note now sued on.

The note was endorsed in blank, by Armor the payee. It is therefore clear, the plaintiff being the holder of the note thus endorsed, may sue for and claim its amount, as that of a note payable to bearer, and claim under the first endorser, who is the payee of the note.

His subsequent blank endorsement, could have no other effect, than to authorise the holder to fill it up as he pleased, or treat the note as one payable to bearer. Banks require the blank endorsement of those who offer notes for discount, or which are deposited therein for collection; and it never was pretended, that such an endorsement was evidence of a transfer of property in the note, until it was delivered, or the endorsement filled up.

The record of the suit brought by Morgan, shows that that suit was dismissed. There is, therefore, nothing in what is offered to prevent the present plaintiff from urging his possession of the note, with a blank endorsement, as evidence of his right of action thereon.

A claim on a commercial firm cannot be pleaded in compensation or setoff to a demand by one of the partners against the defendant.

The other means of defence, cannot avail the defendant. He cannot urge a claim, on a firm of which the plaintiff was a member, in defence of the individual claim of the latter; because a claim on a firm, cannot be offered in compensation of that of one of its members.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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vs.
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LEAVENWORTH vs. PLUNKETT.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

A petition for an order of sequestration is not an amendment of the original pleadings; but is in a manner wholly unconnected with them, and does not require leave of the court to file it.

To obtain an order of sequestration of a tract of land, to prevent the possessor from committing waste, and using the fruits and revenues, the affidavit must set forth a *legal cause*, that the party obtaining it, has *good ground* of apprehension, &c. It is insufficient to state he has *ground* to apprehend that the defendant will commit waste, &c.

The plaintiff alleges he is the owner of a section of land, lying on Red River, in the parish of Natchitoches, which was confirmed by act of congress, passed the 5th of February, 1825, to one John Litton, from whom he derives title. That notwithstanding his right and title to said land, the defendant has taken possession of a part of it, and refuses to restore it, although amicably demanded. He prays that the defendant be required to restore and deliver up the possession, and pay him ten thousand dollars for waste and profits, in cutting timber and raising crops thereon, and that he be adjudged to pay one thousand dollars per annum, from the inception of suit until possession is restored, for the use of said land, &c.

The defendant pleads a general denial; and denies specially that the plaintiff and Litton, under whom he claims, have any title to the land in contest. The land confirmed to Litton, he alleges, is situated on the Bayou Tortoise, near the Sabine where he resided in 1814, when he filed his application and claim before the land commissioners; and that he never cultivated or occupied any land on Red River, &c. That the claim of John Litton has never been located by competent authority, so as to embrace the land occupied by this

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respondent. It is admitted a survey was made and patented, but was caveated, and on appeal to the commissioner of the general land office, the patent was withheld, &c.

He further alleges that he settled on the land in contest, previously to the year 1829, and has continued to cultivate and occupy it ever since ; that a preemption has been awarded him by the register and receiver, at Opelousas, according to law. That acting in good faith, he has made valuable improvements on the land, worth ten thousand dollars, for which he prays judgment in case of eviction.

After suit had been pending six months, the plaintiff presented his petition, alleging that he had *good grounds to fear and apprehend*, that the defendant would make use of his possession, to dilapidate the land occupied by him, and waste the fruits and revenues arising therefrom ; he prayed that the land in controversy be sequestered during the pendency of the suit. An affidavit of the plaintiff embracing these facts, accompanied the petition.

The District Judge allowed a writ of sequestration as prayed for, on the plaintiffs executing his bond with a surety, in the sum of two thousand five hundred dollars.

From the order of sequestration, the defendant appealed.

Winn, for the appellant, assigned the following points as errors on the face of the record.

1. That the new petition is clearly an amendment of the original one ; and no amendment can be filed without leave of the court, and which must be obtained in open court, *Code of Practice*, 419.

2. The affidavit of the plaintiff is insufficient to obtain an order of sequestration. It only states that the affiant has "*grounds to apprehend waste, &c.*", which is too vague, loose and equivocal, to sustain this application and order.

3. This is such a case as will authorise an appeal. The injury would be irreparable without it. A man's entire property might be taken from him without color of justice or law. 5 *Martin*, N. S. 42.

Boyce, contra.

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FLUNKETT.

1. This is a conservatory measure given by law, to a party who has good ground to apprehend that his adversary will make use of the property in contest, so as to dilapidate or waste the fruits and revenues during the pendency of the suit. *Code of Practice, art. 275, No. 3.*

2. The appeal is illegal, and does not properly lie from the decision of the court refusing to dismiss the order of sequestration. The appeal should therefore be dismissed.

Winn, in reply, contended, that the appeal was properly taken; and would lie in this case. 5 *Martin*, N. S. 42. 10 *Martin*, 174.

Martin J., delivered the opinion of the court.

The defendant is appellant from an order of the district judge, granting a writ of sequestration on the petition and affidavit of the plaintiff, made subsequent to the institution of suit.

The appellant relies on the following assignment of errors.

1. The petition for the order of sequestration, is clearly an amendment of the original one, and as such, could not have been filed without leave of the court.

2. The affidavit on which the application is grounded, is not such a one as the law requires.

3. The affidavit states, that the affiant has *ground to apprehend, &c.*, which is too vague, loose and general.

A petition for an order of sequestration does not appear to this court to be an *amendment* of the original petition. It is in a manner wholly unconnected with it. It does not necessarily supply any defect in the original pleadings, as it often sets up and claims a right resulting from circumstances *posterior* to the *petition*. This is the case when the *ground* of apprehension is given by the conduct of the defendant during the pendency of the suit. All that the law requires in the affidavit on an application for a writ of sequestration, is that it should set forth the causes for which the order is claimed.

A petition for an order of sequestration, is not an amendment of the original pleadings; but is in a manner wholly unconnected with them, and does not require leave of the court to file it.

The plaintiff swears, "he has *ground to apprehend* that the defendant will make use of his possession to dilapidate and

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To obtain an order of sequestration of a tract of land, to prevent the possessor from committing waste and using the fruits and revenues, the affidavit must set forth a legal cause that the party obtaining it has good ground of apprehension, &c. It is insufficient to state he has ground to apprehend that the defendant will commit waste, &c.

waste the fruits and revenues produced by the property and convert them to his own use."

The cause set forth in the affidavit, must be *essentially*, a legal one. In the present case we are referred, for the legality of the cause stated in the affidavit, to the *Code of Practice*, art. 275, No. 3. This requires *good ground* of apprehension.

The court is of opinion, that when the affidavit does not state any particular ground of apprehension, so as to enable the court to judge of it, he must at least bring his case within the words of the Code, and allege that he has *good ground*; otherwise the most futile pretexts and statements, would enable the party, to sequester the property of the defendant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that the order of sequestration be rescinded; the appellee paying costs in this court.

GRIFFITH & WIFE vs. MINER.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
OF THE THIRD PRESIDING.

According to the 883d article of the Code of Practice, the appellant has three days, within which to file the record, after the return day of the appeal, or on cause shown within this period, he may obtain further time to bring it up.

The three days, after the expiration of which, the appellee is entitled to the clerk's certificate to that effect, if the record is not filed or cause shown, are *days of grace*, within which the appellant must file the record or show cause to the contrary.

After the expiration of the three days of grace, if the record be not filed or cause shown, the appellee has three alternatives; he may obtain the clerk's certificate, and proceed to the execution of his judgment; or he may file the record and have the judgment affirmed; and lastly, have the appeal dismissed.

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The appellant may bring up and file the record, after the expiration of the three days of grace, and without showing cause, if the appellee has not availed himself of any of the alternatives allowed him, in case of the failure of the appellant to file it, within the three days grace.

It is the uniform practice of the Supreme Court, when without the fault of the appellant, his case cannot be placed before it to have a revision of the judgment of the inferior court on the merits, and when justice requires it, to remand the cause for a new trial.

The plaintiffs instituted suit against Stephen Miner, in his life-time, for the recovery of three hundred and ten arpents of land, situated in the parish of Concordia, which they allege, the wife of the plaintiff, formerly Eliza A. Walker, inherited from her mother, Ann B. Walker, deceased, late widow of Peter Walker. They allege, that said tract of land was confirmed to said Ann B. Walker, in her own right, by a *requette*, dated 15th September, 1802, by J. Vidal, then commandant of the post of Concordia, and by commissioner's certificate, the 25th April, 1811; that the said Eliza A. Griffith is the only heir of the said Ann B. Walker, deceased, and is entitled as such, to said tract of land. They allege, that the late Stephen Miner, formerly of Mississippi, now deceased, in his life-time took possession of the land in controversy, and has acquired large revenues and profits therefrom; and that the said land is now occupied and possessed by his heirs, since his death, and is in the actual possession and occupation of his son Stephen Miner, who claims it as his own, who has also acquired large revenues and profits therefrom, and who refuses to deliver it up, or to account for the profits and revenues. The petitioners pray, that the said Stephen Miner be decreed to deliver up said tract of land, and pay over to them the amount of revenues he has gathered.

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After answer put in by Stephen Miner, his death was suggested in a supplemental petition filed, and the widow, Mrs. Charlotte C. Miner, natural tutrix of the defendant's only child, made a party to defend this suit.

Mrs. Miner, for herself, and as natural tutrix of her child, answered, and denied that her late husband ever received any profits, accruing from the land in question, either from his father, or on his own account, that were not far exceeded in value, by the improvements made upon the land, and the taxes paid therefor; that her late husband derived title to the land, under the will of his father, and the deed of partition, between him and his brother William John Miner, in February, 1829; that his father, Stephen Miner, possessed said land by an open, notorious and uninterrupted possession, for more than twenty years before bringing this suit, and certainly more than ten years prior to said period, and that Ann B. Walker resided in the parish of Concordia, for more than twenty years immediately preceding her death, and more than five years elapsed, before institution of this suit, after the plaintiff, Eliza A. Griffith, came of age. She further avers, that Stephen Miner acquired said land, by a verbal sale or exchange made with Ann B. Walker, in 1807; and relies also for title, on a letter of said Ann B. Walker, written by herself, or by her authorised agent, or which was fully sanctioned by her, and which letter is annexed to the answer of said Miner.

The defendant further pleads prescription; and in case of defective title and eviction, she prays to be allowed ten thousand dollars for her improvements. She refers to the deed of partition between her late husband and Wm. John Miner, and prays that the latter be cited in warranty, and made to account for said land and profits, as by the act of partition he is bound, in case judgment is rendered against her; and that this suit be dismissed.

Upon these issues, after exhibiting a mass of testimony upon the merits of the matters in controversy, the jury returned a verdict for the plaintiffs, restoring them the land described in the petition, and allowing one thousand two

hundred dollars, for the rents and profits received by the defendants, since January, 1829, the time of bringing suit, and the costs; and for the defendant, against William J. Miner in warranty, in the sum of three thousand dollars, being half the value of the land recovered by the plaintiffs, and six hundred dollars for one-half of the rents and profits received, since the inception of suit. Judgment was rendered on the minutes, in conformity with the verdict, on the 7th December, 1832, and signed by the judge of the third judicial district, who tried the cause.

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The counsel for the defendant, objected to the judgment being signed, on the ground, that the day on which it was signed, was not a judicial day, it being the day on which by law, the same court was required to commence its session, in the adjoining parish of Carroll, but waived all other objections. His objections were filed in writing, and are in the record.

An appeal was taken, which was granted on the 6th of December, 1833, returnable to the Supreme Court, at Alexandria, the first Monday of October, 1834. The record was brought up and filed by the appellant, on Thursday the 9th of October, 1834. The court did not meet and form a quorum to do business, until Wednesday the 8th. The record was therefore filed, on the second judicial day of the term, being the third day after the return day of the appeal.

The clerk of the District Court, who attended the trial of the cause, certified at the foot of the parole evidence, that the foregoing pages contained all the evidence taken, *visa voca* in the case.

On the same day, being the day judgment was rendered on the minutes, the district judge who tried the cause, certified, "that the foregoing pages contained all the parole testimony, on which the case was submitted to the jury;" and "that the documents marked, &c., contained all the documentary and written proof given to the jury."

At the time of granting the appeal, the original answer of Stephen Miner was mislaid or lost, which fact appeared by affidavits of the clerk, annexed to the record. The clerk

WESTERN DIST. who had succeeded to the office, at the time of granting the
October, 1834. appeal, and who made out the record, certifies, "that the
ORRITT ET AL. foregoing pages, from one to seventy-two, contains a true
VS. transcript of all the proceedings, as well as of all the docu-
MINER. ments *now on file, and of record*, and of all the evidence upon
which the suit was tried, *so far as the said proceedings, docu-
ments and evidence, now appears among the records of my office.*"

An affidavit of the clerk, who was in office at the trial of the case, was filed in the record, who declared, that Charlotte C. Miner, tutrix of her minor child, and defendant in this cause, resided out of the state of Louisiana, with her said child, and continues to reside out of the same.

Dunbar, for the defendant and appellant, assigned for error on the face of the record, that the judgment appealed from, was signed by the judge, after the expiration of the term of the court, as fixed by law.

R. Ogden, Winn and Mason, for the plaintiffs, moved to dismiss the appeal for the following causes:

1. The record was not returned and filed in this court, at or within the time fixed by law, and the order of the appeal, in consequence of which the appeal is prescribed.

2. The appeal being suspensive, should have been taken and returned to the first term of the Supreme Court, succeeding the rendition of the judgment appealed from, to wit, at the October term, 1833.

3. The statement of facts is imperfect, and insufficient to enable this court, to try the case on its merits.

4. The appeal does not come up in such a shape, as to enable the court to examine the case.

5. The record is incomplete, a material document having been lost, since the trial of the cause in the District Court, which is established by the affidavit of the former, and the certificate of the present clerk.

6. The transcript is not certified by the clerk, as the law requires, so as to enable this court to know, that the whole case is before it.

Dunbar, for the defendant and appellant, stated that the causes, which prevented the record from being filed on the return day of the appeal, were beyond the control of the appellant, and for which he is not to suffer.

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2. It is shown, that the appellant resides out of the state, and has two years to appeal in.

3. The certificate of the judge, at the foot of the record states, that it contains all the evidence, both parole and written, upon which the case was submitted to the jury. It is sufficient to try the cause on its merits. *Code of Practice*, 586.

4. But if it shall appear, at the time or before the trial, that the record is not complete, the appellant is entitled to have judgment suspended, until it be completed. *Code of Practice*, 898, 899.

5. If the case cannot be examined on its merits, we at least show, on the part of the defendant and appellant, that justice requires that the cause be remanded for a new trial.

Martin, J., delivered the opinion of the court.

The plaintiffs and appellees in this case, have prayed, that the appeal be dismissed, on the following grounds :

1. That the transcript had not been filed on the first day of the term, which was the return day thereof.

2. That the clerk's certificate is insufficient.

3. That an important document, viz : the answer of the defendant is missing, and made no part of the record.

The appeal was made returnable on the first Monday of October, 1834. On that day none of the judges attended. The roads were so much obstructed by the fallen timber, occasioned by the late storm, that rendered an attendance on the first days of the court, impossible. The clerk adjourned the court until the second day, when one of the judges arrived, who adjourned over until Wednesday, when all the judges were present in court, and which was the first judicial day. The transcript in the present case, was filed on the succeeding day, which was Thursday, and the second judicial day of the term. On this day, leave was asked and

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According to the 883d article of the Code of Practice, the appellant has three days within which to file the record after the return day of the appeal; or on cause shown within this period, he may obtain further time to bring it up.

The three days, after the expiration of which the appellee is entitled to the clerk's certificate to that effect, if the record is not filed or cause shown, *as days of grace*, within which the appellant must file the record or show cause to the contrary.

After the expiration of the three days of grace, if the record be not filed or cause shown, the appellee has three alternatives: he may obtain the clerk's certificate and proceed to the execution of his judgment; or he may file the record and have the judgment affirmed; and lastly, have the appeal dismissed.

The appellant may bring up and file the record, after the

given, to file the transcript, but the counsel for the appellees, who was present, observed, that he reserved to himself the faculty of showing that the transcript was irregularly filed.

The Code of Practice, *article 883*, allows to the appellant, who has not filed the record within the three days, after which the appellee is entitled to the clerk's certificate, the faculty within these three days, to obtain, on cause shown, further time to bring up the transcript.

In the case of *Rost vs. St. Francis church*, 5 *Martin, N. S.* 191, this court considered the three days, after which the appellee is entitled to the certificate of the clerk, *as days of grace*, within which the appellant may file the transcript. Until these days have elapsed, the Code of Practice does not seem to authorize any steps to be taken by the appellees, in relation to the disposition of the cause. After the expiration of this period, or that of any particular time, which the appellant may obtain from the court, the appellee has three alternatives: he may proceed to the execution of his judgment, by obtaining the clerk's certificate; he may require the affirmance of the judgment, and lastly, require the dismissal of the appeal. *Ibid.* 884. But the *Code of Practice* requires, before he proceed to the exercise of the two last alternatives, that he should bring up the transcript of the record. *Ibid.* 590. In the latter case, the dismissal is to be claimed, as if the record had been brought up by the appellant, and which, it is contended, excludes the neglect of the appellant to bring the record, from the causes which authorize the dismissal of the appeal.

We are not dissatisfied with the decision, in the case of *Rost vs. St. Francis church*. When an act is to be done within a given time, as the filing of an answer, and the like, it may be done afterwards, if nothing occurs which prevents it. Thus, if a judgment by default has not been taken, an answer may be put in to the merits, although more than ten days may have elapsed, from the service of citation.

We are, therefore, of opinion, the transcript of the record was filed in time.

The certificate of the clerk, attests the correctness of the transcript, so far "as the documents and evidence now appear among the records of the office."

It appears from the face of the transcript that the officer who subscribes the certificate, is of late appointment, who did not hold the office at the time the cause was tried. There is, however, a certificate of the judge, attesting that the record contains all the evidence given to the jury.

It is, however, admitted, that an important document is missing, viz: the original answer of Miner. An effort has been made to obtain a copy, and have it used on the trial in this court; and the clerk has certified, that the original is lost. This circumstance has been urged, as a ground for a claim, to have the appeal dismissed, because the appellant has not brought up such a transcript of the record, as will authorise this court, to revise the judgment appealed from.

As no fault or neglect can be attributed to the appellant, we cannot see any reason to dismiss the appeal, on account of an accident, over which he had no possible control.

The appellee has urged his inability, to proceed in the hearing of the case on its merits, without this document. As there is no legal means, by which evidence of its contents may be directly brought before us, no other steps can be resorted to, than to remand the cause to the tribunal, in which evidence of the contents of this missing document, may be legally received.

This requires the reversal of the judgment. Such has been the uniform practice of this court, that whenever, without the fault of the appellant, a case cannot be placed before it, in such a manner, as to enable the court to revise the judgment of the inferior tribunal, and when justice requires it, to remand the case for a new trial. *M^d Daniel vs. Insall, ante 241. 9 Martin, 92.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the verdict set aside, and the case remanded for a new trial; the plaintiffs and appellees paying costs in this court.

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expiration of the three days of grace, and without showing cause, if the appellee has not availed himself of any of the alternatives allowed him, in case of the failure of the appellant to file it, within the three days grace.

It is the uniform practice of the Supreme Court, when without the fault of the appellant, his case cannot be placed before it, to have a revision of the judgment of the inferior court on the merits, and when justice requires it, to remand the cause for a new trial.

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VS.
FLINT ET AL.

SMALL VS. FLINT & THOMAS.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

The plaintiff has a right, on proving his demand, to have a judgment by default made final, without waiting for it to be called regularly on the docket.

A judgment by default made final, will not be set aside for an answer to the merits, when the defendant can show nothing in his favor but his own *laches* and their fatal consequences.

Relief will be granted on a motion for a new trial, when it will not be extended to a case in which it is sought to set aside a final judgment, in order to make a valid defence to the merits.

This is an action by the holder of a negotiable note against the drawer and the payee as endorser, for five thousand seven hundred and fifty dollars, payable on the 1st March, 1834, with ten per cent. interest thereon from the 14th of May, 1833, until paid.

The petition alleges, that payment was demanded of the drawer and refused, of which the endorser had legal notice; and that payment hath been *ineffectually demanded*; wherefore he prays judgment against the defendants *in solidum* for the amount of said note and interest.

Judgment by default was taken by the plaintiff against the defendants, on the 30th April, 1834; and on the 6th of May following, the plaintiff's counsel made proof of the execution of the note, and the judgment by default was made final and signed by the judge.

On the 8th of May, two days afterwards, *Flint*, one of the defendants, filed his affidavit, alleging that he and his co-defendant had a valid defence to the action; that they had prepared answers to the merits of the case, but were taken by surprise when coming into court on the morning of the 7th May, and learning that the judgment was made

final; that there were fifty or sixty cases between the cause under trial, and this one, by which they were induced to believe, it would not have come on for several days, &c., that the judgment was obtained in an irregular manner, while a jury case was pending, and in a course of trial; they move the court that said judgment be set aside, that they be permitted to file their answers, which were annexed to the affidavit, and pray for such other order and decree as may be legal and just.

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On the filing of this affidavit, with the answers annexed, the defendants in *propria personâ*, moved the court *ex officio*, to set aside the judgment taken by default, and order a new trial.

The district judge overruled the motion for a new trial, to which decision the defendants took a bill of exceptions. They then appealed.

Mason and Winn, for the plaintiff, contended that this case did not come within any of the rules or provisions of law, which permitted a final judgment to be opened or revised. It is not allowed by any of the modes pointed out in the Code of Practice, or settled by any decision of this court. *Code of Practice, article 556, 312.*

Flint, for the defendants, urged the equity and justice which required the judgment to be set aside on the ground of surprise, and that it was premature; and that there was a valid and meritorious defence to the plaintiff's demand.

2. He contended that there were no *laches* to be imputed to the defendants, when their defence was just and equitable. From the facts and circumstances set forth in the affidavit, the judgment should be set aside, and the answers permitted to be filed.

Martin, J., delivered the opinion of the court.

The defendants being sued as maker and endorser of a promissory note, failing to put in answers, and judgment by default was taken on the 30th of April, 1834, which was made final on the 6th of May following, and signed by the

WESTERN DIST. judge. On the 8th of the same month, a motion was made
October, 1834. by the defendants to have the final judgment set aside. The

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decision of the District Court overruling that motion, is the matter this court is now called on to revise.

The motion was based on the affidavit of the maker of the note, setting forth the following facts.

The suit commenced during the April term, 1834. There were then on the docket before this suit between fifty and one hundred others, which were jury cases, and were neither decided nor called up for trial. The attention of the court, at the time the motion was made, had been engrossed since the first of the month, instant, by a jury case of considerable importance and great detail; so that no other case could have been regularly taken up. Both defendants daily and constantly attended the court, and neither of them saw or heard of any other case being acted on in the meanwhile, except the present, which could not have been reached in the regular course. One of the defendants arrived at the court-house on the morning of the day on which the judgment appears to have been made final, a few minutes after the opening of the court, and was assured by some one present that nothing had been done, but to read the minutes. The case already mentioned was still before the jury, and both the defendants were ignorant, until the minutes of the court were read on the morning of the seventh of May, of the judgment having been made final. They had communicated to the attorneys of the plaintiff their intention of making a defence; and did not expect after this, that the judgment would have been made final until the cause was regularly reached on the docket. The defendants further urged that they had, by the conduct of the plaintiff, been deprived of the means of making a legal, valid and equitable defence to the merits of the action, viz: that the note sued on had been given to the plaintiff in lieu of a former one given him for the price of eleven negroes, and which three months after the sale, was alleged to have been lost; that three of the negroes so purchased had died, and others were languishing from redhibitory maladies, whereby the defendants were entitled to a diminution of the price.

The judgment by default is admitted to have been properly taken, and the question is narrowed down to a simple point : Was it properly and regularly made final ?

On the part of the plaintiff, it is contended that it was. His attorney might have required that it be made final three days after the default had been taken, *i. e.* on the *fourth* of May. Out of courtesy to the defendants, he waited until the sixth, when he considered his duty to his client forbade a further delay ; that the notice of an intention to make a defence had been given before the institution of the suit ; that judgments by default are made final three days after the first judgment is rendered, and there is no necessity to wait, as in contested cases, until they are regularly reached in the progress of the business of the court, in calling the docket.

On the part of the defendants, it cannot be seriously contended that they have not been guilty of some *laches* ; but they urge the District Court ought to have considered that the penalty claimed by the plaintiff mulct them to the amount of thousands of dollars, while the injury which he might sustain, if they were relieved, was a short delay only. This court has been referred to the case of *Randal vs. Bayon, 4 Martin, N. S. 132*, in support of the present application.

The court cannot say that any impropriety of conduct can be attributed to the plaintiff or his attorney. If the defendants suffer, it is in consequence of their own *laches*.

The plaintiff is in possession of a judgment by default, regularly made final. The defendants can offer nothing to induce us to set aside this judgment, but their own *laches* and their fatal consequences.

The case of *Randal vs. Bayon, 4 Martin, N. S. 132*, was one in which relief was granted on a motion for a new trial. The present case is that of a definitive judgment, sought to be set aside.

There is a prayer for damages, on account of the frivolous appeal. Although both the defendants are members of the bar, this court will indulge the belief, that they have been induced to hope, they might obtain relief at our hands, by the too favorable view in which men are apt to consider their

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The plaintiff has a right, on proving his demand; to have a judgment by default made final, without waiting for it to be called regularly on the docket

. A judgment by default made final, will not be set aside for an answer to the merits, when the defendant can show nothing in his favor but his own *laches* and their fatal consequences.

Relief will be granted on a motion for a new trial, when it will not be extended to a case in which it is sought to set aside a final judgment, in order to make a valid defence to the merits.

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OWN cases. Perhaps the plaintiff's claim to damages, is rendered less forcible, by the consideration of his having availed himself of the opportunity, which the defendants have given him (although unwillingly), of bringing his suit to a favorable issue. We do not consider this such a case, as requires the infliction of heavy damages, none are consequently awarded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BENSON vs. MATHEWS.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Credits or other writings not signed, endorsed on the back of a note or act, which is in the possession of the creditor, and tend to liberate the debtor, and are crossed out or erased, must be considered as entitled to credit.

An *erased* credit on a note in possession of the creditor, is not conclusive proof of payment, but may be repelled by other proofs or presumptions to show it was endorsed on the note erroneously.

So where two credits, one of four hundred dollars and one of three hundred and eighty dollars, were endorsed on a note in the possession of the creditor, and the former was erased, both endorsements appearing to be made on the same day: Held, that the erasure was proper and the credit erroneously endorsed, when on weighing the presumptions arising from all the circumstances of the case, they preponderate in favor of the creditor.

This is an action on a promissory note executed by the defendant on the 15th January, 1824, to M. Wells, for one thousand seven hundred dollars, with ten per cent. interest until paid; who endorsed it to the plaintiff, deducting for credits

six hundred and sixty-eight dollars, credited the 20th January, 1825; three hundred and eighty dollars, the 26th April, 1826, and one hundred and twenty dollars, the 16th March, 1825, making in all one thousand one hundred and sixty-eight dollars. The plaintiff prays judgment for the balance, which he alleges is due on said note, and that certain slaves which were mortgaged to secure its payment be seized and sold to satisfy the same.

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The defendant pleaded a general denial; and that he has made payments which more than extinguish the balance due on said note, viz: in February, 1827, he paid seven bales of cotton, worth three hundred and fifteen dollars, and in April, 1826, four hundred dollars, and that he transferred a judgment on Curtis's estate, amounting in principal and interest to six hundred and twenty dollars, making in all one thousand three hundred and thirty-five dollars, which leaves a balance of one hundred and sixty-seven dollars, of principal due him, for which and all accruing interest he prays judgment in re-convention.

The court after calculating interest and deducting payments, gave judgment in favor of the plaintiff for one hundred and ninety-four dollars and fifty-two cents, and interest from the time this balance was payable. The defendant appealed.

Flint and Thomas, for the plaintiff, submitted the case on a brief explanation.

Winn, contra, contended that a credit of four hundred dollars had been endorsed on the note, and was erased while the note was in the possession of the plaintiff and which must be allowed unless satisfactorily accounted for.

Bullard, J., delivered the opinion of the court.

This suit was instituted by the plaintiff as endorser, to recover of the maker, an alleged balance due on his promissory note. He alleges in his petition, that there is a credit on the note, of three hundred and eighty dollars, paid on the 26th of April, 1826, together with other credits, and the

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original note was annexed to the petition. The defendant admitted the execution and endorsement of the note, but denied that there is any balance due. He alleges, that on the 26th of April, 1826, he paid four hundred dollars, which has not been credited on the note, and that about the month of February, 1827, he paid seven bales of cotton, worth three hundred and fifteen dollars. That in fact he has, through error, overpaid the note, and he demands judgment in re-convention, for the amount thus overpaid.

On these issues the cause was tried below, and judgment having been rendered against the defendant, for a balance of about two hundred dollars, he appealed.

It was agreed, that the original note sued on, should be annexed to the transcript, and submitted to the inspection of this court. But it is not now before the court, although in his return to a *certiorari*, the clerk of the District Court, states, that it was sent up according to agreement. Under these circumstances, by consent of parties, we are authorised to examine the case upon its merits, according to the evidence in the record, dispensing with the original note, and even a copy of it.

One of the witnesses says, that there appears to be a credit on the note, for four hundred dollars, bearing date, April 26, 1826, which appears to have been erased, and that there is another credit on the note of the same date, for three hundred and eighty dollars.

It is contended, by the counsel for the appellant, that he is entitled to both these credits, unless the plaintiff satisfactorily accounts for the erasure, and that allowing that credit, the note has been overpaid, and he is entitled to recover back, in re-convention, the surplus.

Credits or other writings not signed, endorsed on the back of a note or act, which is in the possession of the creditor, and tend to liberate the debtor, and are crossed out or erased, must be considered as entitled to credit.

The general principle appears to us well settled, and we need refer to no other, as we could to no higher authority than Pothier in support of it: "*Quand même les écritures non signées qui sont au bas ou au dos d'un acte qui est en la possession du créancier, et qui tendent à la libération de ce qui est porté par cet acte seraient barrées, elles ne laisseraient pas de faire foi; car il ne doit être au pouvoir du créancier*"

en la possession duquel est l'acte, ni moins encore en celui de ses héritiers en barrant cette écriture, de détruire la preuve du paiement qu'elle renferme." 2 *Pothier Ob. No. 726*.

This proof, in favor of the debtor, like most others, is not final and conclusive, but may be repelled by other proofs, either of facts or presumption, which tend to convince the mind, that the erased credit was in fact endorsed on the note erroneously, and that only three hundred and eighty dollars were paid on that day, instead of seven hundred and eighty dollars.

The question, therefore, presented for the solution of the District Judge, and which we are called on to reverse, was one of fact alone, and we proceed to receive the evidence on both sides furnished by the record.

On the part of the defendant, he shows an acknowledgment on the back of the note, of two credits on the same day; it does not appear in whose hand writing: the one for four hundred dollars erased, and the other for three hundred and eighty dollars which is admitted in the petition.

On the part of the plaintiff, his attorney, sworn as a witness, says, that in his frequent conversation with the defendant, he never pretended to claim the amount credited and erased, and that since suit was brought, he contended that he had nearly paid the note. In the next place he has in his favor the presumption arising from the possession of the note, from the improbability of a note of seventeen hundred dollars, being so largely overpaid, from the fact, that afterwards, two other payments were made, the one in the transfer of a judgment against Curtis, and the other in seven bales of cotton. The presumption arising from the fact, that the creditor retained possession of the note is increased by another, to wit: that the payment was secured by a mortgage on certain property of the defendant, and he took no steps to cause the mortgage to be cancelled. The declaration of the defendant, that he had nearly paid the note, was a negative admission that it was not entirely paid. Few men are so careless as to forget the payment of four hundred dollars. The District Judge had before him the original paper, and could perceive

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MATHERWA.

An erased credit in a note in possession of the creditor is not conclusive proof of payment, but may be repelled by other proofs, or presumptions, to show it was endorsed on the note erroneously.

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So where two credits, one of four hundred and one of three hundred and eighty dollars, were endorsed on a note, in the possession of the creditor, and the former was erased, both endorsements appearing to be made on the same day: *Held*, that the erasure was proper and the credit erroneously endorsed, when on weighing the presumptions arising from all the circumstances of the case, they preponderate in favor of the creditor.

whether the two credits were in the same hand writing, and whether the erasure was with the same colored ink, and therefore, probably made at the same time, merely to correct the amount of the credit, to which the defendant was entitled.

The defendant in his answer, alleges, that he paid four hundred dollars on that day, which has not been credited on his note, and at the same time, relies in support of his allegation, on the credit which is endorsed, and which had been erased. Nothing is said in his answer about the erasure, and while he addresses himself to the conscience of his adversary, to obtain evidence of the payment of seven bales of cotton, delivered a year afterwards, he forbears to interrogate him on the subject of the more important item of four hundred dollars. After weighing these presumptions, the court below, rendered judgment in favor of the plaintiff, for a small balance, and according to the uniform rule of decision in this court, in matters of fact, we cannot say, that the judgment is clearly erroneous.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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TALIAFERRO
VS.
KING ET AL.

TALIAFERRO vs. KING ET AL.

**APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.**

The service of citation without the petition of appeal, is defective and insufficient. The Code of Practice, articles 581-2, expressly require the service of both.

When the service of the process of appeal is defective and insufficient, the appeal will be dismissed on the motion of the appellee.

This is an injunction case. The plaintiff obtained an injunction to stay an execution which issued against him, in the name of the widow and heir of Thomas A. King, for seven hundred dollars, on the ground, that, since obtaining the judgment, on which said execution issued, he purchased a claim against the estate of Thomas A. King, now deceased, amounting to one thousand dollars, which he offers in compensation of the judgment and execution against him. The clerk of the District Court, for the parish of Catahoula, in which the parties reside, granted the injunction and stayed all proceedings, until they could be heard on their respective claims.

On motion, the district judge dissolved the injunction, on the ground that the case was properly cognizable by the Court of Probates, and that the District Court was without jurisdiction. The plaintiff in the injunction appealed.

The appeal was allowed, returnable to the Supreme Court at Alexandria, on the first Monday of October, 1834.

The sheriff of Catahoula, in making service of the appeal, made the following return on the back of the original citation: "Served on Mrs. Mary King, the copy of the *within notice*, on the same day as received. 3 September, 1834."

Wm for the defendants and appellees, moved to dismiss the appeal for want of legal service. The sheriff's return

WESTERN DIST. shows there was no copy of the petition served on the appellees, as is required by law.
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PRUDHOMME

vs.

VIENCE'S ESTATE

The service of the citation without the petition of appeal, is defective and insufficient. The Code of Practice, articles 581—3, expressly require the service of both.

When the service of the process of appeal is defective and insufficient, the appeal will be dismissed on the motion of the appellee.

Thomas, contra.

Martin, J., delivered the opinion of the court.

This case comes before the court on a motion to dismiss the appeal. The dismissal is claimed on the ground of defective service of the appeal on the appellee. It appears that a copy of the petition of appeal did not accompany the copy of the citation.

The service of the citation, without the petition of appeal, is defective and insufficient. The Code of Practice, articles 581, 582, expressly require the service of both.

The appeal must, therefore, be dismissed.

PRUDHOMME, CURATRIX vs. VIENCE'S ESTATE.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF NATCHITOCHES.

Where creditors agree, to allow a syndic five per cent. commission on the *real amount* he may have in his hands in the course of his administration, he is only intitled to a commission on the amount of *moneys actually received* by him, and not on the amount of notes or property which came into his hands.

By the act of 1817, the commission of syndics cannot exceed five per cent.; and if the first syndic is allowed full commissions on the property which came into his hands, his successor, to whom it is delivered for final distribution, would be intitled to nothing.

The 1876th article of the *La. Code*, relates only to executors, and restricts their commissions to two and a half per cent. on the amount of the inventory, when they have had seizin of the whole estate.

The plaintiff, as curatrix of the succession of her deceased husband, claims a commission of five per cent. on the aggregate amount of certain notes, which came into his hands as syndic of the estate of François Vienne, and which were delivered over to the present syndic. The amount of notes and debts due the estate of Vienne, which passed through the hands of the plaintiff's deceased husband while acting as syndic, was eight thousand four hundred and ninety-five dollars and ninety-three cents, on which she claims five per cent., amounting to four hundred and twenty-four dollars and seventy-nine cents. She alleges she has demanded this sum from A. Sempeyrac, at present syndic of Vienne's estate, who refuses to allow her claim; wherefore, she prays judgment therefor, with interest and costs.

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PRUDHOMME
vs.
VIENNE'S ESTATE

The syndic pleaded the general issue; and that the plaintiff, or her husband in his life-time, while syndic, received the amount to which he was entitled.

The evidence shows that the plaintiff's husband was appointed syndic of Vienne's estate by the creditors thereof, who declare "he is entitled to receive for his services, a commission of five per cent. *on the real amount he may have in his hands, in the course of his administration.*"

It is also admitted, that the account claimed, is for commissions on uncollected notes, delivered over to the syndic, the present defendant, after the death of the former syndic.

The probate judge was of opinion, that by the words *real amount*, in the *procès verbal* of the deliberations of the creditors, it was evidence of their intention to allow the commission only on *money actually received by the syndic*, and not for the trouble of having the property sold and taking notes therefor. Judgment being for the defendant, the plaintiff appealed.

This case was submitted, after brief explanations by *Mr. Barry* for the plaintiff, and *Gen. Thomas*, for the defendant.

Bullard, J., delivered the opinion of the court.

The only question presented by the pleadings in this case, is whether a syndic, who administers an insolvent succession, under an agreement with the creditors, that he shall receive

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FRUITIONER
vs.
VIGOR'S ESTATE

Where creditors agree to allow a syndic five per cent commission on the *real amount*, he may have in his hands in the course of his administration, he is only entitled to a commission on the amount of *moneys actually received* by him, and not on the amount of notes or property which came into his hands.

By the act of 1817, the commissions of syndics cannot exceed five per cent; and if the first syndic is allowed full commissions on the property which came into his hands, his successor, to whom it is delivered for final distribution, would be entitled to nothing.

Article 1676 of the La. Code relates only to executors, and to two and a half per cent. on the amount of the inventory when they have had seizin of the whole estate.

a commission of five per cent. on the real amount received by him, be entitled to charge that commission on notes due to the succession, not collected by him, but handed over to his successor. The expressions used by the creditors, in their deliberations, are, "that the said syndic should be entitled to receive for his services in that capacity, a commission of five per cent., on the real amount he may have in his hands, in the course of his said administration, agreeably to law." It is evident the creditors contemplated that the syndic should continue to administer fully on the estate, convert the property into money, and distribute it among the creditors. But he died before the administration was closed, and another syndic was appointed, and the notes given by purchasers at the sale of the estate, were handed over by his representatives to the new syndic.

We concur in opinion with the judge *à quo*, that the creditors intended to allow the syndic a commission only on the amount of moneys actually received by him, in the course of his administration. The promissory notes of purchasers, do not, in our opinion, constitute a real amount in his hands. By the act of 1817, the commissions cannot exceed five per cent., and if the first syndic in this case, were to be allowed full commission on the notes in question, his successor, who is to collect them and distribute the proceeds among the creditors, would be entitled to nothing.

The 1676th article of the Louisiana Code, on which the appellant relies, does not appear to us to support her pretensions. That article relates only to executors, and restricts their commissions to two and a half per cent., on the amount of the inventory, when they have had seizin of the whole estate.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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DAY
vs.
MARTIN.

DAY vs. MARTIN.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Where it appears, that the plaintiff in execution was prevented from making his debt out of property seized by the wrongful suing out an injunction, the surety in the injunction bond, is liable in damages for an amount not exceeding the penalty of the bond.

Although a judgment enjoined, draws interest until paid, the claim of the plaintiff, against the surety in the injunction bond, is for damages *not liquidated*, which do not carry interest, and cannot exceed the penalty of the bond.

This is an action, instituted by William Y. Day, as assignee of Edward A. Day, on an injunction bond executed in favor of the latter, by the defendant Wm. C. C. Martin, as surety for Robert Martin, in the penalty of one thousand five hundred dollars.

The plaintiff alleges, that in 1827 he issued his execution, for a balance of a judgment against Robert Martin, of more than two thousand dollars, and levied it on four slaves, which was enjoined by the defendant therein, and the bond sued on executed for only the sum of one thousand five hundred dollars. He alleges, that said injunction was wrongfully sued out, and was dissolved and dismissed, at the November term, 1829, of the District Court for the parish of Rapides; that he sustained great damage, in consequence of the suing out said injunction, amounting to more than the penalty in the bond. He prays judgment against the defendant, for the penalty of the bond.

The defendant denied, generally and specially, that the plaintiff had any right to sue, or that any injury was sustained by the obligee of the bond; and if any, it was released by prescription and the *laches* of the party, in not recovering the debt from the principal in the bond.

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vs.
MARTIN.

The plaintiff proved a regular assignment of the original judgment, against R. Martin, to himself.

The record of the injunction suit, is also in evidence. R. Martin alleges in his petition for the injunction, that he only owed about one thousand dollars on Day's judgment, and that four of his slaves were seized to pay said balance; but that he had made a further payment of twenty-five bales of cotton, which was not credited, and conveyed a valuable tract of land, which Day was to sell, pay himself out of the sale, and account to him, which he has failed to do; that E. A. Day is dead, and his brother is setting up a fraudulent claim to said judgment. Day joined issue on the injunction, and on the 11th day of November, 1829, it was dissolved and dismissed.

It further appeared in evidence, that since obtaining the injunction, R. Martin removed to Texas. This was about 1830. That the negroes seized, and released by the injunction, were soon after sold to pay other debts, and one of them died.

The district judge, after hearing all the evidence in the case, rendered judgment for the plaintiff, for one thousand one hundred and twenty-one dollars and fifty cents, with ten per cent. interest, from the 18th August, 1830, until paid; and for fifty dollars attorney's fee, in dissolving the injunction, and the costs of suit. The defendant appealed.

Boyce, for the plaintiff.

Winn and Mason, for defendant.

Bullard J., delivered the opinion of the court.

The plaintiff, as assignee of E. A. Day, claims of the defendant, as surety of R. Martin, on an injunction bond, damages alleged to have been sustained by him, in consequence of the wrongful suing out of a writ of injunction, to stay proceedings on an execution, in virtue of which, the sheriff has levied on four slaves, the property of the principal.

He alleges, that the injunction was afterwards dissolved, as having been wrongfully issued, and that in the meantime, one of the slaves died. Another was sold, at the suit of another creditor, and the others cannot be found. The defendant pleads substantially the general issue, denying the right of the plaintiff, and alleging that the action is barred by prescription, and that the defendant is released by the laches of the plaintiff, in not pursuing the proper steps to recover from the principal.

The evidence offered by the plaintiff, shows the execution of the bond, the assignment to him, the dissolution of the injunction, and the loss and total dispersion of the property, out of which the execution might have been satisfied, if the injunction had not been granted. One of the slaves is shown to have died, and it is contended by the defendant's counsel, that the loss ought not to fall on him. The court of the first instance, appears to have been satisfied, that if the injunction had not been granted, that slave, together with the others, would have been sold for the benefit of the plaintiff; and the loss of them being a direct consequence of the stay of proceedings, the defendant is responsible. It appears to us satisfactorily, that the plaintiff has been frustrated in the recovery of his debt, by means of the wrongful injunction; and that the defendant is liable in damages, for an amount not exceeding the penalty of the bond. But the court below has, in our opinion erroneously, given a judgment, which, on computing interest at ten per cent., makes the amount greater than the penalty sum. Although the original judgment bore interest until paid, the claim of the plaintiff against the surety is for damages not liquidated, and which consequently do not carry interest. The balance due on the 18th of August, 1830, is admitted to be one thousand and nine dollars. Adding to this the interest, which had accrued at the time of the trial, and a reasonable allowance for expenses, incurred in defending the suit in injunction, will make about fourteen hundred dollars, which we think the plaintiff entitled to recover.

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vs.
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Where it appears that the plaintiff in execution was prevented from making his debt out of property seized by the wrongful suing out an injunction the surety in the injunction bond is liable in damages for an amount, not exceeding the penalty of the bonds.

Although a judgment enjoined draws interest until paid, the claim of the plaintiff against the surety in the injunction bond, is for damages, not liquidated, which do not carry interest, and cannot exceed the penalty of the bond.

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DUNLAP
vs.
BAILEY.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed; and proceeding to give such a judgment as ought, in our opinion to have been rendered in the District Court, it is further adjudged and decreed, that the plaintiff recover of the defendant, the sum of fourteen hundred dollars, with costs in the District Court, those of the appeal to be paid by the plaintiff and appellee.

DUNLAP vs. BAILEY, EXECUTOR, &c.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF RAPIDES.

Where an executor is appointed, and directed in the will, to sell the property of the testator, and deliver the residue of the proceeds to the heir, he is authorised to take possession and sell it, without the seisin of the estate being expressly given.

The plaintiff, as attorney of the absent heirs of Jules Belot, deceased, applied to the judge of probates, for the parish of Rapides, for an injunction to restrain the defendant, as testamentary executor, from selling the property of said decedent, on the ground that he had no seisin of the property of the estate, given to him by the will. The petition alleges, that the executor has taken illegal possession of the effects of said estate, and has sold part of it, without any order or authority of court, and has advertised the real estate and slaves for sale, also without authority. The petitioner prays, that the executor be enjoined from proceeding any further, or from exercising any right of possession or disposal of said property, until he gives bond with security, for the faithful administration thereof.

On the first of November, 1832, Jules Belot made his olographic will, in which he declares, "after the payment of my debts, which will be operated by the sale of my house and lot, and all the goods and moveables that I may own at my death, I give unto my father for his life-time, my negro girl Vinik, who is to be free at his death;" and any balance

arising from the sale of his property, after paying his debts, he bequeathes to the foundling hospital in Paris, &c. His father having died before him, the testator, on the 12th September, 1833, made the following codicil to his will :

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"My father being dead, the dispositions in his favor are by this subsided, but it is my wish, that the balance of the clauses of the said will, remain the same as heretofore ; and to insure it the better, I nominate Mr. Wm. Bailey for my testamentary executor, and beg of him to make his best exertions, to send to my daughter the whole of my property, or to send for her in France, and put her in some respectable house of this country, where she can get a good honest education, and for this last service, that I will receive of him, I give him *ten per cent.*, on every net sum that will be collected out of my estate."

The will was admitted to probate, on the 8th July, 1834. The executor proceeded to take possession of the property, and dispose of it under the will. The plaintiff, as attorney for the absent heirs, was of opinion, the executor was not entitled to the *seizin*, by the terms of the will, applied for an injunction, which was refused by the probate judge. The plaintiff appealed from the order of *refusal*.

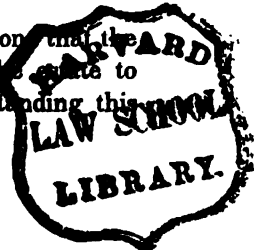
The only documents and evidence, upon which the proceedings were had, was the petition and copy of the will. The probate judge granted the appeal.

The case was explained by *Mr. Dunlap, in propria persona*, and by *Mr. Dunbar*, for the defendant.

Martin J., delivered the opinion of the court.

The plaintiff being attorney of the absent heirs of Belot, is appellant from the decision of the Court of Probates, refusing to enjoin the defendant from exercising any right, or act of possession, in relation to the property belonging to the estate of Belot, until he shall first give bond and security for his faithful administration.

The injunction was prayed for on a suggestion that the will does not give the *seizin* of the property of the estate to the executor ; and that the latter had, notwithstanding this



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BAILEY.

want of authority, advertised the property for sale, and was about to sell it, without first obtaining the order of the Court of Probates, for that purpose.

It is admitted on the part of the defendant, that the property was offered for sale, without any order of court, but that this was an error which has since been cured.

The testator directs, that the payment of his debts be effected by the sale of his house and lot, and of his goods. He bequeathes to his father a life estate in a slave, who is to be emancipated after his death. Whatever is left from the sale of his estate, after the payment of his debts, he gives to a hospital in Paris, in France, for the benefit of his daughter, whom he left there.

The father dying first, the testator by a codicil appointed the defendant his executor, and directed him to send his property to his daughter.

Where an executor is appointed, and directed in the will, to sell the property of the testator, and deliver the residue of the proceeds to the heir, he is authorised to take possession and sell it, without the seizure of the estate being expressly given.

It appears from the will, that the testator made his daughter his universal legatee, and directed his executor to transmit the residue of his estate to her. This could not be effected in any other mode than by a sale of the property. It could not be made in kind as respects the house and lot, or the slave, even if the latter be not entitled to her freedom. The executor could not execute the will, without taking possession of the property and selling it, when the heir was in France. The Court of Probates did not, therefore, err, in refusing the injunction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Probate Court be affirmed, the appellant paying all costs.

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CLARY vs. GRAYSON.

CLARY
vs.
GRAYSON.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

In the division of the parish of Ouachita, and establishment of the parish of Carroll, in 1832, the law provides that the taxes for 1831, in the part embraced by the new parish of Carroll, shall be collected by the sheriff of Ouachita, and by him paid over to the sheriff of Carroll: *Held*, that the sheriff who came into office in Ouachita, after the taxes were collected, was not responsible for their payment; and for any sums he collected as deputy of his predecessor, he is not liable except to his principal.

This suit is instituted by the plaintiff, as sheriff of the parish of Carroll, demanding from the defendant a sum of money, which he alleges the latter collected as taxes due in the parish of Carroll, while acting as sheriff of the parish of Ouachita. The petition charges that by the 13th section of the act of the 21st March, 1832, the amount of the parish tax of 1831, due by the inhabitants of the parish of Carroll, shall be collected by the sheriff of the parish of Ouachita, and by him paid over to the sheriff of Carroll; and further charges, that the defendant as sheriff has collected said taxes to the amount of three thousand dollars, which he has refused and failed to pay over to him (the plaintiff), who was duly qualified as sheriff of Carroll, and authorised by law to receive the same. He further alleges that by the wrongful detention of said sum, the inhabitants of the parish of Carroll, and he as sheriff thereof, sustained damages to the amount of one thousand dollars. He prays judgment for said sum and damages; and that the defendant answer interrogatories: 1. Have you not collected of the inhabitants of that part of the parish of Ouachita, included in the parish of Carroll, three thousand dollars, parish tax for the year 1831? 2. If you have not collected that amount, state precisely the sum you have collected? 3. Have not said taxes been demanded of you?

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The defendant pleaded a general denial. That the law of the legislature, relied on by the plaintiff, is unconstitutional: that the money claimed by the plaintiff was appropriated by the parish of Ouachita, previous to said act of the legislature, relied on, being enacted. He further pleads the prescription of one year, against any damages which may be claimed of him.

To the first interrogatory he answers, he does not know the exact amount of taxes he collected. That Jonathan Morgan, who was the sheriff of Ouachita, collected some of the taxes referred to, some were collected by this respondent as deputy sheriff, and some by another deputy of said Morgan, in all about two thousand one hundred dollars. 2d. He has answered this interrogatory in his answer to the first. 3d. To this he answers yes.

It was admitted that the plaintiff was sheriff of Carroll, at the institution of this suit; that Jonathan Morgan was sheriff of Ouachita, and collector of the parish taxes for 1831, and continued as such until March, 1832. That on the 10th March, 1832, the defendant, who had previously been the deputy of Morgan, was commissioned sheriff of the parish of Ouachita, and gave bond and qualified on the 24th of that month.

The evidence showed that the parish taxes for 1831, were collected and credited in the account of Jonathan Morgan, as sheriff, on the books of the parish treasurer of the parish of Ouachita, that they were collected in part by the defendant and paid over from time to time; that in the month of September, 1832, the parish treasurer of Ouachita, made a settlement with the sheriff of Carroll, when the parish taxes of Carroll, amounted to two thousand one hundred and seventy-four dollars and seventy-nine cents, subject to a credit of two hundred dollars. That the whole of said parish taxes for 1831, were charged to J. Morgan, as sheriff of Ouachita, and collector thereof, on the 15th November, 1831, and that all the payments of said taxes so charged, were credited to his account accordingly.

The act of the legislature, establishing the parish of Carroll, passed in March, 1832, section 13, provides, "that the

amount of parish tax for 1831, due by the inhabitants of that part of the parish of Carroll, shall be collected by the sheriff of Ouachita, and by him paid over to the sheriff of Carroll.”

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CRATSON.

The district judge rendered judgment in favor of the plaintiff, against the defendant, for one thousand nine hundred and seventy-four dollars and seventy-nine cents, with interest and costs. The defendant appealed.

Winn, for the plaintiff, considered, as the defendant had received the taxes, due to the parish of Carroll, for 1831, although not sheriff at the time they were all collected, or when the law passed, yet having received them, as was shown by the evidence, he held them subject to this law, and was bound to account for them accordingly.

Barry, for the defendant, contended that the taxes of 1831, were appropriated by the police jury of Ouachita, before the passage of the act of 1832, and before the parish of Carroll existed, or was taken from Ouachita.

2. The operation of the law, under which these taxes are claimed, would be retrospective, and the law unconstitutional.

3. The taxes now demanded, were collected by the former sheriff, and if any one is liable to this action, it is him. The present defendant cannot be sued for this claim.

Mason, for the plaintiff, in reply.

1. The act of the legislature, under which this claim is made, is constitutional, because it is only directory to the sheriff, in paying over the taxes collected within the bounds of the new parish of Carroll.

2. The present sheriff is properly sued, because he was in office, before this money was appropriated by the police jury of Ouachita, and collected part of it himself.

Bullard, J., delivered the opinion of the court.

The act of the Legislature, approved, March 14th, 1832, providing for the establishment of the new parish of Carroll,

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composed of a part of that of Ouachita, and a part of Concordia, provided among other things, that the amount of parish tax for 1831, due by the inhabitants of that part of the parish of Ouachita, forming the parish of Carroll, should be collected by the sheriff of Ouachita, and by him paid over to the sheriff of Carroll. In pursuance of that statute, the present suit was instituted by the one sheriff against the other, alleging that the defendant as sheriff of the parish of Ouachita, has collected the tax to the amount of three thousand dollars, and refuses to pay it over. The plaintiff prays judgment for that amount, and one thousand dollars damages.

The defendant put in for exception, that he was not the sheriff, and had no authority to collect the taxes in question, but that Jonathan Morgan was the sheriff at the time, and the only person responsible. This exception being overruled, the defendant pleaded on the merits, and judgment being rendered against him, he appealed.

In the division of the parish of Ouachita, and establishment of the parish of Carroll, in 1832, the law provides that the taxes for 1831, in that part embraced by the new parish of Carroll, shall be collected by the sheriff of Ouachita, and by him paid over to the sheriff of Carroll: *Held*, that the sheriff who came into office in Ouachita, after the taxes were collected, was not responsible for their payment; and for any sums he collected as deputy of his predecessor, he is not liable except to his principal.

The evidence shows, that Morgan was the sheriff of Ouachita, at the time the tax of 1831 was collected, that a part of it was collected by the present defendant, then acting as deputy, and by other deputies, and that the amount was paid over by him to the parish treasurer, and credited to the account of Morgan, his principal, and that he entered on the discharge of his duties as Morgan's successor, on the 24th of March, 1832, after which period it does not appear, that any part of the tax was collected.

It appears to us clear, that the statute did not impose on the present sheriff, the duty of collecting the tax, because he was not sheriff at the time it was collected, and that for the sums received by him as deputy, he was responsible only to his principal. In the capacity in which he is sued, he shows that the law imposed no duty upon him in relation to that tax, because he was not the official collector for the tax of 1831, and having paid over to his principal the sums collected, as deputy, he is no longer accountable even to him.

It has been urged, that Jonathan Morgan, being *functus officio*, is no longer liable to be sued as sheriff. To that it may be answered, that if the statute in question, imposed a

duty upon him, which he neglected to perform, he rendered himself personally liable. It is, however, certain, that he was out of office before the passage of the act.

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We forbear to touch the question, whether according to the fair construction of the statute, or the general principles of law, the two parishes are bound to make an equitable partition of any funds existing in their common treasury at the time of their separation. That question does not properly arise between the present parties.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and judgment is here rendered in favor of the defendant, with costs in both courts.

EVERETT vs. M'KINNEY AND WIFE.

71 375
52 186

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF CONCORDIA.

The Court of Probates will not entertain jurisdiction of a suit against a curator of an estate to recover the property which it is alleged, has been irregularly sold, and especially, when the purchasers are not made parties.

The Probate Court, cannot inquire directly into the title to real estate, though there are cases in which it may be done incidentally.

It is not enough to allege that a defendant is curator of an estate, to give jurisdiction to the Court of Probates, of the subject matter, not in itself of probate jurisdiction.

The plaintiff alleges he is the lawful heir of one William Hyman, deceased, whose succession has been opened in the parish of Concordia, and that it consists of a tract of land, slaves, stock of cattle, plantation implements, crops gathered, rights and credits, amounting to about twelve thousand

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dollars, which property belonging to said estate, was sold by the widow of said Hyman, without the authority and formalities of law ; there being no counsel for absent heirs appointed to attend the taking of an inventory, and no account of any administration was rendered for several years, as required by law. He alleges that said proceedings are null and void ; and that the widow has since intermarried with one George G. M'Kinney, to one or both of whom, letters of curatorship have been granted : He, therefore, prays, that they be cited, that an attorney for absent heirs be appointed, and that he may be recognized as heir of the said William Hyman, deceased ; that the sale of said estate, and all the proceedings had in this court, in relation to it, may be annulled, and that he be put in possession thereof.

On the 10th December, 1832, the defendants filed their answer, denying, generally, the plaintiffs demand ; and specially his heirship and right to sue, &c.

On the 10th July, 1833, the defendant filed his peremptory exception to the petition ; alleging he was not bound to answer to the merits, because the Probate Court had no jurisdiction of the case, and prayed that it be dismissed.

The judge of probates, rendered judgment on this exception, dismissing the cause ; first, because the title to immovables is involved, of which the Probate Court has no jurisdiction ; second, the property is alleged to have been sold, and must be in the hands of third persons, whose rights cannot be decided on, without making them parties. The plaintiff appealed.

R. Ogden and Winn, for the plaintiff, explained the case. They contended, that the Probate Court had jurisdiction of the matters set up by the plaintiff in his petition, and was the proper tribunal in which she should present his claim, and he recognised as heir.

Dunbar, for the defendant, replied, that the plaintiff's action could not be maintained. The sales of the property claimed, cannot be annulled, without making the purchasers

parties to the suit. This not being done, the suit must be dismissed. WESTERN DIST.
October, 1834.

2. This is not an action of revendication, and consequently the property demanded, cannot be reclaimed.

3. The curatrix is not called on to account for the property of her deceased husband's succession, and no judgment can be rendered against her. In every point of view, therefore, in which it may be considered, this cause cannot be sustained.

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VS.
M'KINNEY ET AL.

Bullard, J., delivered the opinion of the court.

The only question presented in this case for our decision, is whether the petition sets forth any matters of probate jurisdiction.

The petition begins by alleging that he is a lawful heir of one Hyman, whose succession is open in the parish, and unadministered. That one of the defendants claiming to be the widow of the deceased, took possession of the estate, consisting of land, slaves and moveables, that it was sold by her without an observance of the provisions and formalities of law, and that the proceedings which have been had in the court to which the petition is addressed, are null, because no attorney of absent heirs was appointed, and no account of any administration was made and returned for several years after the opening of said succession. He then prays that the widow, who is said to have intermarried with the other defendant, and to one or both of whom, letters of curatorship have been granted, may be cited, &c., that he may be recognised to be a lawful heir of the deceased, that the sale of the said estate and all the proceedings had in this court, may be annulled, avoided and reversed, and the petitioner thereupon put in possession of said estate, or such portion thereof, as may be adjudged to him, and for general relief.

It is evident, the plaintiff's principal object is to recover the property of an estate irregularly sold, and it is clear the Court of Probates cannot inquire directly into the title to real estate, though there are cases in which it may be done incidentally, for certain purposes. It is alleged, that the property has been

The Court of Probates will not entertain jurisdiction of a suit against a curator of an estate to recover the property which it is alleged has been irregularly sold, and especially when the purchasers are not made parties.

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The Probate Court cannot inquire directly into the title to real estate, though there are cases in which it may be done incidentally.

It is not enough to allege that a defendant is curator of an estate, to give jurisdiction to the Court of Probates of the subject matter not in itself of probate jurisdiction.

sold, but to whom is not shown, nor is the supposed purchaser made a party. It is true, the plaintiff states that letters of curatorship have been granted to one or both of the defendants, but he does not ask that the letters of curatorship may be vacated, nor for an account of administration. It is not enough to allege that a defendant is curator to give jurisdiction to the Court of Probates of the subject matter not in itself of probate jurisdiction. The same remark may be made in relation to the allegation that the plaintiff is an heir, and the prayer that he may be recognised as such. The question of heirship may be inquired into, in any court of original jurisdiction, as a fact, on which the rights of the parties may depend. As an abstract question, it is no more of the exclusive competence of the Probate Court, than of any other. An heir, in order to sue for the property of an estate, which he claims in that character, is not obliged, first, to resort to a Court of Probates, to establish the fact of his heirship.

It has been attempted to show, that this is in fact, an action to annul judgments, orders and proceedings in the Probate Court, and consequently, that no other court could take cognizance of it. But the orders, judgments and proceedings, are not specified; on the contrary, it is alleged, that the estate is unadministered, and no authority to administer is asked. It is essential to an action in nullity of a judgment, that it should be brought against a person who was a party to the judgment. This is not alleged in this case. It is vaguely stated, that all the proceedings and orders are null, without showing that the defendants were parties, much less, that the plaintiff was. In this respect, this action has not the semblance of an action to annul a judgment. We infer from the whole tenor of the petition, taken together, that the allegation of nullity in the proceedings, was merely incidental to the principal demand, to wit: the recovery of property illegally alienated, belonging to the succession of Hyman, and that there is no question of probate jurisdiction stated, which the defendants had any interest in contesting. We are,

therefore of opinion, that the court, did not err, in sustaining the exception. WESTERN DIST.
October, 1884.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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vs.
CUNY ET AL.

FLINT, SYNDIC, &c. vs. CUNY ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE
OF THE SEVENTH PRESIDING.

Where two judgments are rendered in the same case, and the last is appealed from, and decided to be a nullity, the right of appeal on the first judgment is suspended, until the decision takes place, and an appeal may be taken within a year from that period, although more than a year has elapsed, since signing the judgment appealed from.

This is an action instituted by the syndic, appointed by the creditors of the late Samuel C. Cuny, to rescind two sales of certain negroes and other property, first conveyed by S. C. Cuny, in his life-time, by notarial act, dated 24th May, 1824, to Stephen E. Cuny, and by the latter to R. R. Cuny, by act dated 17th May, 1826. The consideration expressed in both sales, was eight thousand one hundred dollars. See the case reported in 6 *La. Reports*, 67.

In his answer, Dr. R. R. Cuny, the last purchaser, avers the sale to him was for a *bonâ fide* consideration, that he would pay off a judgment of N. Cox, against his deceased brother, S. C. Cuny; that in pursuance of said agreement, he has paid N. Cox seven hundred and fifty-four dollars and seventy-six cents, and obligated himself to pay the balance of one thousand two hundred and three dollars and forty-seven cents, with interest and costs. He further states, "he

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has never actually received into his possession, but a part of the property enumerated in said sale; and avers he is willing on his part, to re-convey *all the property that is in his possession*, by virtue of the said sale to him, to the petitioner, as syndic of the succession of Samuel C. Cuny, as soon as the said syndic shall pay him the sum of seven hundred and fifty-four dollars and seventy-six cents, with interest, &c., which he paid to N. Cox, and pay the further sum of one thousand two hundred and three dollars and forty-seven cents, with interest and costs as stated, for which he has become bound to said Cox, as a part of the consideration of said conveyance to him, by S. E. Cuny."

In an amended answer subsequently put in, Dr. Cuny pleads the prescription of one year against the action, as tending to rescind the sales; and avers, no injury was sustained by the creditors of S. C. Cuny, who are represented by the plaintiff, because they were not such at the time of the sale to him, and that they became creditors (if at all) since.

There were two appeals in this case. The first was tried, and sent back from the last judgment rendered. The second appeal was taken the 29th of October, 1833, from the first judgment rendered in the District Court, which was signed the 11th November, 1831. The Supreme Court decided, that the last judgment rendered by the district judge, was a nullity, and that the execution of the first judgment being suspended, until a decision was had on the last, the appellant's right of appeal was reserved accordingly. On the return of the case to the District Court, the present appeal was taken, although more than a year had elapsed, since the signing of the judgment appealed from.

Plint, for the plaintiff, insisted that this case must be dismissed, as the appeal was not taken, within a year from the date of the judgment appealed from.

2. The sales from S. C. to S. E. Cuny, and from the latter to Dr. Cuny, are simulated and void as to creditors, and must be set aside.

3. The syndic represents the creditors collectively, and is not restricted in his action, to set aside said sales, to a year from their passage, but only within a year from the date of his appointment.

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Dunbar and Winn, for the defendants.

1. The delay in appealing, in this case, was occasioned by the act of the appellee, who notified the defendants to comply with the last judgment, instead of the first, there being two in the same case.

2. The Supreme Court, in deciding that the first judgment was the right one to appeal from, has reserved the right of appeal, and the limitation to appeal within a year, runs only from the date of the decision of the appellate court. See 6 *La. Reports*, 67.

3. The sales were made for a good consideration, to indemnify Dr. Cuny against a claim he became responsible for, on account of S. C. Cuny, to N. Cox. Even creditors cannot set them aside, as more than a year elapsed before suit.

Martin J., delivered the opinion of the court.

The facts of this case are correctly stated in the report of the decision of this court, when it was before us at the last term in October, 1833. See 6, *La. Reports*, 67. The judgment then appealed from, was reversed on the ground, that the District Court having already given a final judgment in the case, erred in re-considering that judgment, and rendering a second. The defendants are now appellants from the first judgment, and the appellees have prayed the dismissal of the appeal, on the ground that it was taken after the expiration of more than a year after the rendition of the judgment appealed from. This objection, it is contended, is fatal, as the appellant was of full age, and a resident of the state.

This court is of opinion, the appeal was well taken, and in time. It appears by the proceedings of the District Court, after rendering and signing the judgment now appealed from,

Where two judgments are rendered in the same case, and the last is appealed from, and decided to be a nullity, the right of appeal on the first judgment is suspended until the decision takes place; and an appeal may be taken within a year from that period, although more than a year has elapsed since signing the judgment appealed from.

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its execution was suspended, until the second judgment was set aside in the first appeal, as in case of an action of nullity.

On the merits, it appears the verdict of the jury is, that the sale of the defendants be cancelled, rescinded and set aside, and that R. R. Cuny, be re-imbursed, the sum of one thousand nine hundred and fifty-eight dollars, by him paid to N. Cox, and the costs of the suit, of said Cox, against him. The jury also find the slave Antoine, to be the property of the defendant, R. R. Cuny. On this verdict the court rendered judgment, cancelling and rescinding the sales, and that R. R. Cuny, recover from the plaintiff, as syndic for the creditors, the sum found by the jury to be due on account of the judgment debt of N. Cox. The latter part of this judgment is complained of. It is urged that the evident intention of the jury was, that R. R. Cuny, has the same right to the sum found, that the plaintiff has to the property, the sale of which is cancelled, and that he is not to receive the sum from the syndic as an ordinary creditor.

This court is of opinion that the objection ought to be sustained.

It is, therefore, ordered, adjudged and decreed, that the judgement of the District Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the sale from S. C. Cuny to S. E. Cuny, and that from the latter to R. R. Cuny, complained of by the plaintiff, be cancelled and set aside, and that the plaintiff, recover from R. R. Cuny, all the property mentioned in the deed from S. E. Cuny to him, dated May 17th, 1826, filed in this cause, and marked D, together with all the increase of the slaves mentioned therein, on the plaintiffs paying to him the sum of nineteen hundred and fifty eight dollars, and the costs of the suits of N. Cox, against the said R. R. Cuny, in four months from the date of this judgment, and not otherwise; and that the said R. R. Cuny, retain the negro Antoine as his property, and that he be quieted in his possession, and title to said slave; and it is further ordered, adjudged and decreed, that the plaintiff shall not have execution on this judgment, nor otherwise disturb the defendant, R. R. Cuny, in the possession of the

property, the sale whereof, is herein conditionally cancelled, and rescinded, nor any part thereof, until he shall have paid to him the sums herein before stated; the costs of this present suit on the appeal, to be paid by the plaintiff and appellee, and the costs in the District Court by the defendants.

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APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

A bill of sale, executed in Kentucky, and valid under the laws of that state, which expresses the sale to be made, for a *valuable consideration*, without fixing any price, of certain slaves in Louisiana, will be tested by the laws of the place, where the contract was entered into; and being valid there, is good here, as between the parties, although not made in conformity to the laws of this state.

A contract, valid by the law of the place where it is made, as a general principle, is valid every where.

A chirographery creditor of a deceased vendor, whose estate he administers, as testamentary executor, has no right to withhold property or slaves found in the succession, from the vendee by a valid title, but which have not been delivered, without some right or lien, acquired in virtue of judicial process.

The executor derives his power from the will; is primarily the representative of the deceased, and not of the creditors of the succession, when it is not shown to be insolvent, and he is required to account to the heirs, and not to the creditors.

This is an action of revendication. The plaintiff sues to recover two slaves (Adam and Peter,) and two horses, which he alleges to belong to him, but now in the hands of the defendant, as executor of his deceased father, John Hall,

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and which the latter withholds from him, and is about to sell them, under an order of the Court of Probates. He further alleges, that he purchased the two slaves from his now deceased father, in Kentucky, for a valuable consideration, as will appear from a bill of sale, from his father to him, dated the 16th September, 1829, which he annexes to his petition. He states, that these slaves were included with five others, in the same bill of sale, but were in the state of Louisiana, at the time of the sale, and have remained here, as his father died soon after his return from Kentucky; that the defendant, as executor of his father's succession, claims said slaves as a part of it, which, with two horses, also belonging to him, the executor has placed in the inventory, and applied to the probate judge, to have sold. He prays for an injunction, to restrain the sale thereof, and that the executor be condemned to deliver to him, the two slaves and horses aforesaid.

The defendant pleaded a general denial; and that the bill of sale, under which the plaintiff claims the negroes in question, is not a valid instrument, to transfer the property in said slaves, by the laws of Louisiana; that there was no price paid, or consideration or sum specified, in said bill of sale, to be paid for said slaves, and no delivery took place; and that said instrument is equally defective, whether intended as a pledge for money paid or advanced, or as a sale, there being no delivery of the property. He further states, that the succession of Hall owes a large amount of debts, to creditors residing in Louisiana, without having sufficient property to pay the same, and it would be contrary to equity and law, to permit the plaintiff, who is one of the heirs of John Hall, deceased, to take any portion of the property of the succession from the state, &c.

The bill of sale produced in evidence, declares that John Hall, "for a valuable consideration, aliened, granted, bargained and sold, &c., unto Alfred J. Hall, of Scott county, in the state of Kentucky, the following negroes: *Peter, Adam*, &c., slaves for life, being the same negroes, mortgaged by me to M. Goddard, &c., to have and to hold said negroes, to him

the said Alfred J. Hall, subject to said mortgage, and his heirs forever ; and I hereby warrant the title to said slaves, to him the said Alfred, against the claim of all persons whatsoever, save said mortgage," &c.

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James F. Robinson, an attorney at law, in the state of Kentucky, in answer to interrogatories, states, "that he recognises this bill of sale, which was written by him, in the presence of the parties, and signed by J. Hall, who in unequivocal words, said it was a real and *bonâ fide* sale of the negroes named in it, with the professed object of both parties, of passing the titles to them. He further says, that by the laws of Kentucky, said bill of sale is legal and valid ; and no other form is necessary there, to make a legal transfer of slaves ; that the consideration specified, which is called a *valuable consideration*, is sufficient to constitute the bill of sale a legal one ; and that by the laws of Kentucky, *love and affection* from parent to child, is a good consideration to sustain a contract, &c., between the parties and subsequent creditors," &c. ; but that in this instrument, the terms "*valuable consideration*," were used to show, that it was not executed from love and affection, but that he saw the plaintiff pay on the mortgage to Goddard, five hundred dollars, part of a debt due by John Hall, deceased, which both of them stated, was a part of the consideration, which the plaintiff gave his father for said negroes. Witness understood from both, it was a purchase, and not a gift.

In November, 1829, two months after executing the bill of sale of said negroes, John Hall returned to his plantation in Louisiana, and died. In his will, he bequeathes the two slaves, Adam and Peter, the former to another son, John Hall, and Peter and his wife, to a free woman of color and her daughter. These two slaves were in Louisiana, at the time they were sold to the plaintiff, in Kentucky. The plaintiff made an attempt to carry them, and several other slaves, found in the succession of Hall, to Kentucky, but was pursued and overtaken by the defendant.

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The plaintiff had judgment for the two slaves; from which the executor, after an unsuccessful attempt to obtain a new trial, appealed.

Dunbar and Winn, for the plaintiff, contended, that the sale of John Hall to the plaintiff, was good, even if it had been made as a donation, being from father to son, and when the donor is not insolvent.

2. The bill of sale is genuine, and passes title in the slaves to the plaintiff, without delivery.

3. The sale is good, according to the laws of Louisiana; for being valid under the laws of Kentucky, where the contract was made, it is valid every where.

4. It is not necessary, that the term valuable consideration, should be expressed by a fixed sum of dollars and cents, to make a contract valid in Kentucky, where this sale was passed. It is sufficient, if it be for a good consideration, as the love and affection of a parent, &c. This consideration may be shown by testimonial proof.

Boyce, for the defendant, contended, that the executor found the property now claimed by the plaintiff, in the succession of the ancestor of the plaintiff, and was bound to administer it as such.

2. The plaintiff has no legal right or title to this property; for although the contract of sale under which he claims, might be valid in Kentucky, as a sale between the parties, according to the laws of *that state*, yet so far as it purports, to change the ownership of immoveable property, situated in Louisiana, it should have no effect *quoad this property*, because it would not be good if made here.

3. The general principle is admitted, as contended for, that "a contract, valid by the laws of the place where it is made, is valid every where." But the exception is also well founded, that contracts relating to immoveable property, within the jurisdictional limits of this state, no principle of comity or law, requires us to regard or enforce the law

of another state, when it is entirely different in its provisions, from our own.

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4. Where personal or moveable property alone is concerned, the rule (it is admitted,) would be otherwise, both according to the common law, and our own system of jurisprudence. A contract for such objects, would be binding every where, if not contrary to good morals or positive law. This rule is well settled in England. See *case of Potter vs. Brown*, 3 *East's Reports*, 31.

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5. According to *Huberus*, "a deceased person, with a family, whose property was in different provinces, the real property would descend according to the place where it was situated. But with respect to personal property, it would go according to the law of the place where the intestate lived, and of which he was an inhabitant." This court has recognised the same principle in the case of *Saul vs. his creditors*, 5 *Martin, N. S.* 590.

6. The rule then, is established in *Saul's case*, that where the personal statute of domicil, is in opposition to the real statute, where the property is situated, the real statute will prevail.

7. In this case, though the domicil of John Hall might be regarded as in Kentucky, for the purpose of this contract, and that it is to be governed by the laws of that state, as respects its validity, but it cannot operate on property in this state, peculiarly regulated by our laws.

8. To give effect to this contract, as proved by the testimony of the attorney at law, in Kentucky, would be giving effect to a sale of slaves in this state, by parole agreement, which is prohibited by our laws.

Bullard, J., delivered the opinion of the court.

The plaintiff sets up title to two slaves, under a conveyance from his father, the testator of the defendant, and procured from the District Court, an injunction, inhibiting the defendant as executor, from proceeding to sell them as belonging to the estate. The answer admits the execution of the bill of

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A bill of sale executed in Kentucky and valid under the laws of that state, which expresses the sale to be made for a valuable consideration, without fixing any price, of certain slaves in Louisiana, will be tested by the laws of the place where the contract was entered into; and being valid there, is good here, as between the parties, although not made in conformity to the laws of this state.

A contract valid by the law of the place where it is made, as a general principle, is valid everywhere.

sale, which is exhibited as evidence of title, on the part of the plaintiff, but denies that it is a sale, in as much as no price is stipulated, and no delivery ever took place. The defendant further pleads, that the estate of Hall, is largely indebted in the State of Louisiana, and among others, to himself, who is the testamentary executor, and that there is not property enough in the state, to pay the debts due here, and the plaintiff as one of the heirs, cannot legally take out of the state, any part of the property belonging to the estate, while he has in his hands in Kentucky, a portion of it, greater in amount than any debt which the deceased owed him.

The instrument, purporting to be a sale of the slaves in question, was executed in Kentucky, while the slaves were in this state and remained until his death, in the possession of the testator. The first question which the case presents is, whether that instrument is evidence of a contract of sale. It is contended, that it is not because no price is fixed, and determined by the parties, on the authority of the case of *Conway vs. Bourdier et al.* 6 La. Reports, 346. Tested by our law, we should perhaps be compelled to say, that there is wanting an essential ingredient to constitute a sale, and that it could not avail as a donation, because not passed before a notary. But its essential character, as between the contracting parties, is to be ascertained by reference to the laws of the place where the contract was entered into; a contract valid by the law of the place where it is made, is valid every where. This is the general principle often recognised by this court and sanctioned by the highest authorities. 2 *Ken's Com.*, 264. The effect which is to be given to contracts made abroad in relation to our own citizens, is a distinct question. It is shown by evidence in the record, that according to the laws of Kentucky, this instrument would be a valid bill of sale between the parties, and the expression "for a valuable consideration," a sufficient enunciation of the price. We are, therefore, of opinion, that, as between the parties, it vested the title in the plaintiff.

It is equally well settled, that the sale of slaves cannot have effect as relates to creditors before delivery. In this case no

delivery is pretended, and the only remaining question is, whether the defendant, either in his own right as creditor, or in his character of executor, has a right to retain the slaves in question, and sell them to pay the debts of the estate. The defendant has shown that he is a creditor of the deceased. It is clear that the property would be liable to attachment or seizure, at the suit of creditors before delivery, but it does not appear to us to follow, that a creditor would be authorised to retain possession without some right or lien acquired in virtue of judicial process.

As testamentary executor, the defendant derives his authority from the will, and is primarily the representative of the testator. He does not, like a syndic, derive his power from the creditors of the testator, nor is it to them, that he renders his account. He gives no security, and it is to the heirs he is accountable for his administration. They can, at any time, deprive him even of the seizin given by the will, on offering him a sum sufficient to pay the legacies. *Louisiana Code, 1664.*

The plaintiff is, himself, one of the heirs, and the defendant is sued as executor. He alleges that the estate, so far as the property is situated in Louisiana, is insolvent, and that he has a right to retain the slaves in dispute, for the benefit of the creditors. We are not prepared to say, that if it were shown the estate is insolvent, the executor might not be considered, as so far representing the mass of the creditors, as to authorise him to resist the claim of the plaintiff. But he has not shown the insolvency of the estate. A tableau of distribution is exhibited, which has not yet been homologated, and the record does not show the amount of property. We are not to presume insolvency in a case of this kind, and until that is shown, although it may not yet be too late for any creditor to arrest the property in the hands of the executor, he is, in our opinion, without authority, either under the will, or in his own right to defeat the conveyance to the plaintiff, and to refuse delivery. Until he shows some legal claim, he must be regarded as merely representing the testator, and his contracts are binding on his heirs and legal representatives.

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A chirographory creditor of a deceased vendor whose estate he administers as testamentary executor, has no right to withhold property or slaves found in the succession, from the vendee by a valid title, but which have not been delivered, without some right or lien acquired in virtue of judicial process.

The executor derives his power from the will, is primarily the representative of the deceased, and not of the creditors of the succession when it is not shown to be insolvent, and he is required to account to the heirs and not to the creditors.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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STOKER vs. LEAVENWORTH ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Entering a formal appearance of a defendant in a civil suit, is unknown to the practice in Louisiana.

Filing a plea, exception or answer, is the only entry of appearance required.

And in an application for the removal of a cause to the United States Court, filing the petition for such removal, is evidence of the defendant's appearance.

Where a defendant alleges the plaintiff is a citizen of a certain parish, as *appears by his petition*, which states he is a resident: *Held* to be sufficient allegation of citizenship.

Where a person swears, "*to the best of his knowledge and belief*," it is sufficient, and the addition of this qualification, does not detract from the strength of the oath.

When a proper case is made for the removal of a cause to the United States Court, by the defendant, no judgment by default is permitted, but the court is bound to order the removal *instantly*.

Exceptions or counter affidavits, are not allowed against a proper application of a defendant, for the removal of the suit against him to the United States Court.

No affidavit to disprove the allegation for the removal of a cause to the United States Court, will be admitted.

Officers of the army of the United States, stationed on duty in this state, do not cease to be citizens of the state in which they resided, and exercised the rights of citizenship, when called into service.

This is an action in which the plaintiff seeks to make the defendants liable for the value of a slave, which he charges

was killed by their orders, belonging to him, and worth the sum of fifteen hundred dollars.

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He alleges that his slave, named Martin, was killed in the parish of Natchitoches, by three soldiers of the United States army, acting as a patrol, and belonging to Cantonment Jessup in said parish, acting under the orders of Gen. Henry Leavenworth and Captain Andrew Lewis, superior officers, commanding at said post. He charges that the slave was worth fifteen hundred dollars, and that he has sustained five hundred dollars in damages, for all of which, he prays judgment against the defendants *in solido*.

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Gen. Leavenworth, on being cited, presented his petition, stating that he was a citizen of the state of New-York, and was impleaded in a suit with his co-defendant by the plaintiff, who is a citizen of Louisiana, in which the sum of fifteen hundred dollars is claimed; he, therefore, tenders security in the sum of three thousand dollars, and prays that this suit be removed to the District Court of the United States, sitting for the Western District of Louisiana, in Opelousas. An affidavit of the facts set forth, accompanied the petition.

Captain Lewis stated, that he was a citizen of the state of Massachusetts, and made a similar application with his co-defendant, to have this cause removed into the United States Court. In his affidavit, he swears that the facts set forth by him, "*according to the best of his knowledge and belief, are just and true,*" &c.

After these applications were made, the plaintiff moved for judgment by default, which was disallowed by the court, on the ground that a judgment by default, cannot be claimed after the defendants had filed their petitions for removal of the cause; the plaintiff took his bill of exceptions to the refusal.

The plaintiff's counsel excepted to the filing of the petitions of removal of this case to the United States Court, before the defendants made an entry or appearance in court, in conformity with the 12th section of the act of congress of 1789, which were overruled on the ground, that no issue was required to be made up before removal, and the practice

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of this state did not require such appearance before answer or issue joined: a bill of exceptions was taken to the opinion of the court, overruling the exception. The opinion of the court, was also excepted to by the plaintiff's counsel, overruling his application to file counter affidavits, to disprove the facts alleged by the defendants, in their several applications.

The judge made the order of removal of the cause, as applied for. The plaintiff appealed.

Winn for the plaintiff, assigned the following points as errors, on the face of the record.

1. The district judge erred, in allowing the defendants to file their petitions of removal of the case, to the United States Court, before entering appearance in court, according to the act of congress of 1789.

2. The order of removal is erroneous, because the defendants did not make a legal showing, that the plaintiff was a citizen of Louisiana, and that they (defendants) were not citizens of Louisiana; and because one of the defendants in his affidavits, only swears to the *best of his knowledge and belief*, which is insufficient in law.

3. The decision of the District Court was erroneous in refusing a judgment by default, to the plaintiff.

4. The court erred in refusing to allow the plaintiff to show by counter affidavits, that the defendants were both citizens of Louisiana.

The defendants, by their own showing, are citizens of Louisiana, and are actually residing therein.

Boyes, contra.

Martin, J., delivered the opinion of the court.

The defendants in this case made several applications, filed several affidavits and surety bonds, and obtained several and separate orders for the removal of the present suit, to the District Court of the United States. The plaintiff took a separate appeal in each, and has filed a separate assignment of errors as follows:

1. The court erred in permitting the petition for a removal of the cause to be filed before, and without an appearance being entered.

2. The court erred in ordering the removal, as it was not legally shown, that the plaintiff is a citizen of Louisiana; and that *both* the defendants *are not*; and that each defendant did not allege his co-defendant was not a citizen of said state. That the affidavit of one of the defendants, is not absolute, but qualified, being *according to the best of his knowledge and belief*.

3. That the court erred in refusing leave to take judgment by default.

4. And finally in refusing leave to file exceptions and counter affidavits, and thereby show, that the defendants *were* citizens of Louisiana.

5. That one of the defendants, by admitting he was stationed in command of a military post, within the state of Louisiana, was from his own showing, a citizen of Louisiana.

I. The entry of a formal appearance of a defendant, is unknown to the practice in Louisiana. The filing a plea or answer, or taking any notice in court, is the only evidence of such appearance which the record presents, or the law requires. In the present case, the filing of the petition for removal of the cause, was evidence of the defendants appearance.

II. Both petitions for the removal, were filed simultaneously. The petitioners allege, that the plaintiff is a citizen of Louisiana, and a resident of the parish of Natchitoches, as is alleged in his petition. It is contended, that this is not a positive and absolute, but a qualified allegation, and that the citizenship is presented, merely as a consequence of the alleged residence; that although the residence of a citizen of another state, renders him a *citizen* of the state in which he resides, the residence of an alien has not the same effect.

This court is of opinion, that the words, *as appears by the petition*, may well be taken as a reference to what actually appears in that document, that is to say, the residence in the

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Entering a formal appearance of a defendant in a civil suit, is unknown to the practice in Louisiana.

Filing a plea, exception or answer, is the only entry of appearance required; and in an application for the removal of a cause to the U.S. Court, filing the petition for such removal, is evidence of the defendant's appearance.

Where a defendant alleges the plaintiff is a citizen of a certain parish, as appears by his petition, which states he is a resident: Held, to be sufficient allegation of citizenship.

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parish, and not to what does not appear therein, viz: the citizenship.

The applications, though several, being simultaneous, and having the same object in view, may be considered as the joint application of both defendants, who may have been induced to make them in this way, because neither could aver and swear to the citizenship of the other, or they may have found it convenient to give security for both. Each swears to his own citizenship, and each may use the affidavit of his co-defendant, to satisfy the court of the citizenship of the other. A proper case being presented, the court might have made a single order of removal, and the case is not altered by two separate orders having been made.

Where a person swears "to the best of his knowledge and belief," it is sufficient, and the addition of this qualification does not detract from the strength of the oath.

When a proper case is made for the removal of a cause to the U. S. Court by the defendant, no judgment by default is permitted, but the court is bound to order the removal *instantly*.

Exceptions or counter affidavits are not allowed against a proper application of a defendant for the removal of the suit against him to the U. S. Court.

No affidavit to disprove the allegation for the removal of a cause to the U. S. Court will be admitted.

Many have doubted, and this court has expressed its opinion, that it shared in the doubt, whether the addition in the affidavit, that the affiant swears *to the best of his knowledge and belief*, is not such a qualification of the oath, as may enable the party to avoid a conviction of perjury.

After the most mature consideration, our minds have come to the conclusion, that as the party swears to the *best of his knowledge*, he could not shelter himself under an allegation, that he swore according to his *belief* only. The oath, in fact, is not according to the best of his knowledge or belief. We, therefore, conclude, that the addition of this *formula*, detracts nothing from the strength of the oath.

III. When the defendant has made out a proper case for a removal, the State Court is bound to abstain from the further cognizance of the cause, and to order the removal of it *instantly*. It cannot, therefore, allow judgment to be taken by default.

IV. Neither can the State Court act on, or receive exceptions or counter affidavits, in cases of this kind.

V. No attempt to disprove the allegations of the defendants, made in their affidavits, can be allowed. Applications for the removal of a cause, are to be disposed of in a summary way.

VI. The defendants have indeed shown, that, as officers of the army, in the service of the United States, they had been for a long time, in the performance of garrison duty, in one of

the fortifications within the state of Louisiana. But this, in our opinion, does not deprive them of any right they may claim, as citizens of the state in which they resided, and exercised the rights of citizenship, when called out of it and ordered into the service of the United States. They cannot be deprived of such rights, without their consent. A voluntary residence in another state, than that in which one was a citizen, is evidence of an intention to abandon with the residence, the rights that result from it, when the removal is made in pursuit of the affairs or pleasure of the person concerned, but not when a citizen leaves his state, to serve the United States, out of the limits of his own state for a time.

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Officers of the army of the United States stationed on duty in this state, do not cease to be citizens of the state in which they resided and exercised the rights of citizenship when called into service.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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CHEW ET AL. VS. FLINT, CURATOR, &c.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF RAPIDES.

The person making opposition to an application for a curatorship of a vacant succession, must state in writing, the reasons why he claims the curatorship, in preference of him demanding it, and that he has a better right than the party claiming to be appointed; otherwise his opposition will be rejected, with costs.

A special agent or attorney in fact, of one or more creditors, cannot claim the curatorship of a vacant succession, over other creditors or strangers.

A transferee of claims against a succession, for collection, is but a mandatory, and if the transfer is simulated, that is, a mandate in disguise for the purpose of obtaining a curatorship, it cannot operate to the prejudice of *bonâ fide* creditors.

The law requires applications for curatorships of vacant successions, to be published in the gazette, as well as a notice at the door of the court house, and it is made the duty of the judge, to make these publications.

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Publication of applications for curatorships, is to operate as a constructive notice, to all persons having a right to make opposition, and as in all cases of constructive notice, it must be strictly proved.

An entry on the minutes of the Probate Court, stating the fact, that a publication of an application for a curatorship was made, is not evidence of the fact, as relates to persons to be affected by such notice.

The party, claiming the benefit of a publication of an application for a curatorship, is bound to show it was duly made.

This case is founded on two oppositions to the application of the defendant, to be appointed curator of the vacant successions of Jonas Meriam and J. W. Broaddus, merchants, lately trading under the firm of Meriam & Broaddus, in the town of Alexandria, and now deceased.

On the 4th of February, 1833, M. P. Flint, attorney at law, applied to the judge of probates, for the parish of Rapides, for the curatorship of the successions of Meriam & Broaddus, alleging that said firm, and each of its partners, was indebted to him in the sum of forty-one thousand seven hundred and fifty-nine dollars, with interest. He prays that he may be appointed curator to said successions.

On the same day, the probate judge made the following order: "Let this application be advertised, according to law; which petition was duly advertised, on the day of the filing thereof."

On the 13th February, Robert Chew, a resident of the parish of Rapides, and cashier of the branch of the Canal Bank, &c., in Alexandria, filed his opposition to the application of Flint, which he alleges, is based on claims against said successions, that are illegal and unjust, and which ought not to entitle him to the curatorship thereof; and he further alleges, he is the agent and representative of sundry creditors, to a very large amount, residing in New-Orleans and New-York, and of the Canal Bank, for two thousand dollars; wherefore he prays that Flint's application be rejected, and that he be appointed to the curatorship of said successions.

On the 13th March, 1833, following the above, Ezekiel Hayes filed his opposition to the application of Flint, on the ground that he was not a *bonâ fide* creditor of said successions; that he was not the owner of the debts he set up against them, but that said claims were transferred by persons having no rights, and which transfer to Flint was simulated, and without consideration, made to enable him to procure the curatorship of said successions. He alleges, he has the best right to the curatorship, his claim amounting to thirty-two thousand dollars. He prays, that he may be appointed, together with Robert Chew, the first applicant, and who represented his claim in that application.

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Hayes further prays, that the application of Flint be rejected, and that he answer on oath, the following interrogatories :

1. Are you the *bonâ fide* owner of the claims against Meriam & Broaddus, on which your application is based ?

2. Did you pay any consideration for them ? if yea, how much ?

3. From whom did you obtain the claims against Meriam & Broaddus, on which you base your application ?

4. Were they not all obtained from Ivers Jewett ? if not all, how many of them ?

5. Did you obtain said claims by purchase, before the filing of your application ? if not then, when ?

6. Did you pay cash for them ? or what did you give, and how much ?

7. If you have not yet paid, what are you to give ?

8. Do you not know, that Ivers Jewett was a partner of Jonas Meriam, or of Meriam & Rand, or of the late firm of Meriam & Broaddus ?

9. Do you not know, that he has failed, and made an assignment of his property ?

Hayes's opposition was overruled, as coming too late ; to which order of the probate judge overruling the same, Hayes's counsel excepted.

Chew, in his opposition, propounded the same and foregoing interrogatories of Hayes, to which *Flint* answered on oath, as follows :

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1. He says he is the holder and owner of a claim, for the amount stated in his petition, against the succession of Meriam & Broaddus, for forty-one thousand seven hundred and fifty-nine dollars.

2. He says, that he gave his obligation, for the amount essentially negotiable, which was guarantied by his partner, Maj. Isaac Thomas, which said obligation has been transferred by Ivers Jewett, to whom it was given, and notice of transfer given to this respondent.

3. He says, that he obtained the claim on which he has based his obligation, from Ivers Jewett.

4. He says, that Ivers Jewett transferred to him, claims for the above specified amount, on the 4th day of February last.

5. He says, that he has already stated the manner, in which he obtained the claim, and refers to his previous statement for answer.

6. He says he did not pay cash for said claims.

7. He states that he paid on the obligation, that which he has already mentioned?

8. He states that he has already sufficiently answered this interrogatory, in his other answers.

9. He answers, that he does not know that Ivers Jewett has failed, but has heard that he had suffered much by the house of Meriam & Broaddus, and that he does not believe he has made any surrender of his property, in Massachusetts.

The counsel of Chew excepted to these answers, and object, that in his first answer, Flint does not reply to that part of the first interrogatory, which asks him, "if he is the *bonâ fide* owner of the claim." To the fifth, he does not reply fully to that part, in which he is asked, "if he purchased the claim." To the eighth, because he does not answer fully that part, which asks him, "if he is to pay cash, and how much." The exception was overruled, and a bill of exceptions taken.

The claim on which Flint bases his application, is an account current of Messrs. Meriam & Broaddus, with Ivers Jewett, beginning in November, 1831, and ending February 1st, 1833, on which day a balance was struck, in favor of

Jewett, amounting to forty-one thousand seven hundred and fifty-nine dollars and twenty-six cents. WESTERN DIST.
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At the foot of the account current, is the following assignment :

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"For value received, I hereby assign, transfer and set over to M. P. Flint, the balance due me on the above account, against the firm of Meriam & Broaddus, said balance being forty-one thousand seven hundred and fifty-nine dollars and twenty-six cents."

"February, 4th, 1833."

"Ivers Jewett."

The testimony shows, that Meriam died in New-York, about the last of October, 1832, and Broaddus on the 2d of February, 1833, at his residence in Alexandria, Louisiana.

There is no evidence in the record, that the application of Flint was ever advertised, except the statement from the minutes of the court, that the "petition was duly advertised, on the day of the filing thereof."

After hearing all the evidence concurrently, with the opposition of Robert Chew, the probate judge decreed, that Micah P. Flint be appointed the curator of the vacant successions of Jonas Meriam and J. W. Broaddus, deceased, on giving bond with security, according to law ; and that Boyce and Barry be appointed attorneys, to represent the absent heirs ; and that Chew pay the costs of his opposition, the said successions paying the balance.

Chew and Hayes filed a motion for a new trial. 1. The judgment is contrary to law and the evidence. 2. Hayes, a principal creditor, moves specially, that his application ought to have been received as in time, and that he should have been appointed. This motion was overruled. Chew and Hayes both appealed.

Dunbar, Thomas and Flint, in support of the appointment of the curator.

1. In contestations for curatorships of vacant estates, it must be granted to the creditors, in preference to those who are not. The judge is bound to exercise his discretion, in

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choosing between creditors, and to give a preference to the larger. *La. Code*, 1119.

2. A creditor living at the place, or in the state, should be preferred to one who resides at a distant place, or out of the state. 4 *Martin*, 373, 374.

3. Oppositions to appointments, can only be founded on a better right, than the person claiming the curatorship, and must be made within ten days after the application is advertised. The record declares, Flint's application was duly advertised; and Hayes was therefore properly rejected. *La. Code*, 1111. *Code of Practice*, 970, 972.

4. The curator should be a resident of the parish, where the succession is opened. In this respect, Flint must be preferred, and his appointment maintained. *La. Code*, 444, 445, and 1149. See case of *Rust vs. Randolph*, 4 *Martin*, 373.

5. Chew, one of the appellants, was not a creditor, but only the attorney in fact, or agent of creditors; he had therefore no personal interest in the succession, and is not authorised to vote for, or be appointed curator, for it is only for the appointment of syndic, that an attorney in fact can vote.

6. The transfer of Jewett's claim to Flint, was after the succession was opened, but previous to the application for the curatorship and judgment thereon, which latter period is to be looked to, in pronouncing on contestations between creditors, on their respective claims. 5 *Martin*, 89.

7. There is no weight in the objection of the counsel for the appellants, that Flint was the purchaser of a litigious right, and therefore not entitled to the curatorship. A right is not litigious, because it is required to be settled by law, in a court of justice. On this principle, every right or claim might be said to be litigious, because it is liable to be collected or settled by a law-suit.

Winn, Boyce and Barry, for the oppositions of Chew and Hayes, to the appointment of the curator, contended:

1. That in all contestations of curatorships of vacant successions, the creditors of the deceased, at the opening

of the succession, are entitled to the preference, over those who become such afterwards. *La. Code*, 1114.

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2. Although Chew is not a creditor, he is the attorney in fact of creditors, to a large amount, and is authorised to represent them as fully in this case, as if they were present; in this he is *pro hac vice* a creditor, and entitled to the curatorship.

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3. Heirs may accept and administer a succession, by an attorney in fact, and the same reasoning and analogy applies with greater force to creditors. *La. Code*, 1038, 1042, 2966.

4. The application of Flint to be curator, was never in fact advertised, and his appointment is therefore null and void, on this ground. The mere endorsement on the petition, and statement in the record, that it was advertised according to law, is no evidence that it was so advertised. The advertisement must be shown by legal proof. *Code of Practice*, 367-8. *La. Code*, 1109.

5. The claims of Flint were purchased by him, as litigious rights against this succession, and therefore do not entitle him to the curatorship. *La. Code*, 2523, 3622, No. 22.

Bullard, J., delivered the opinion of the court.

The controversy in this case, grows out of sundry oppositions to the appointment of the appellee, to the curatorship of the estates of Meriam & Broaddus. Only two of these oppositions are to be considered by this court, to wit: that of R. Chew, in his own right, and as the attorney in fact of numerous creditors, in New-Orleans, and of E. Hayes, who alleges himself to be a creditor. Separate appeals were taken, and prosecuted by these two parties, and have been argued together. The opposition of Chew was overruled, and that of Hayes not received by the court below, on the ground that it was not filed within the ten days limited by law. Two questions, therefore, present themselves: 1st. Did the court err in overruling the opposition of Chew, upon the merits? and, 2d. Was the opposition of Hayes in time, and based upon such grounds, as authorised him to make opposition?

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The person making opposition to an application for a curatorship of a vacant succession, must state in writing the reasons why he claims the curatorship in preference of him demanding it, and that he has a better right than the party claiming to be appointed, otherwise his opposition will be rejected with costs.

A preliminary inquiry presents itself, to wit: who has a right to make opposition to the appointment of an applicant for the curatorship of a vacant estate. The 1112th article of the Louisiana Code, requires that the opposition should be in writing, stating the reasons why the party opposing, claims the curatorship in preference to the party demanding it. In that part of the Code of Practice, which treats of the appointment of curators of vacant successions, and to absent heirs, the legislature is still more explicit. Article 972 declares that, "this opposition can only be founded on the allegation of a better right on the part of the person opposing, than of the person claiming the tutorship (in the French text *Curatelle*), otherwise it shall be rejected with costs," &c.

The opposition of Chew, which was tried on the merits, and which we are called on to review, was founded on the twofold grounds, that he was a creditor, and that he was the special agent of sundry other creditors in New-Orleans. One of those grounds has been explicitly abandoned in the argument, and it is not now contended, that he is a creditor in his own right. We are, therefore, to regard his claim, only as the special agent of others, who are shown to be creditors.

Several powers of attorney are spread upon the record, all of similar import, signed by various creditors, authorising the appellant, R. Chew, to apply for the appointment of a curator, to the proper tribunal, and further authorising him, in their behalf, to have the said R. Chew, appointed said Curator.

The inquiry, therefore, as relates to Chew, is narrowed down to this: whether a special attorney, in fact, who is authorised to apply for the curatorship, in his own name, shows a better right than the appellant.

The Code establishes the order of preference, article 1114. 1st. The surviving partner, unless the partnership has been a commercial one. 2d. The heir present or represented in preference to the surviving husband or wife. 3d. The surviving husband or wife, in preference to the creditors of the deceased; and, 4th. The creditors in preference to those who are not. This part of the Code, does not give expressly to an attorney in fact of creditors, any preference, either over

A special agent or attorney in fact of one or more creditors, cannot claim the curatorship of a vacant succession over other creditors or strangers.

other creditors or strangers, to the curatorship. Upon his appointment, he would necessarily cease to act as the attorney in fact of particular creditors, because he would be bound to give security, and take an oath, and would be bound to administer for the interest of all the creditors, and not specially for that of his constituents. His authority to apply in his own name for the curatorship, in their behalf, would cease on his appointment, for it is clear, they cannot authorise him to administer for their benefit. Admitting that any one of his principals had a better right than the appellee, it does not follow, that their joint procuration confers a legal right on their attorney in fact, however respectable it may be, as a recommendation to the judge of the Court of Probates.

But it is urged, that, in the administration of estates, a beneficiary heir, who is absent, may administer by a special agent, or attorney in fact, and that *ube eadam est ratio eadam est lex*. The Louisiana Code, article 1038, which is relied on by the counsel for the appellants, provides that, "if the beneficiary heirs are absent, but represented in the state, their attorneys in fact can claim, in the name of their constituents, the preference for the administration over every creditor of the succession, provided they have a special power to accept or reject this succession, or a general power to accept or reject all successions, which may fall to their principals."

This part of the Code, regulates the administration of successions accepted with the benefit of an inventory, and gives to the heir at law, the preference over all others in the administration. He administers, not for the exclusive interest of creditors, but has, in his own right, the residuary interest in the estate. The Code, therefore, even in cases of his absence, does not exclude him; but his attorney in fact is authorised to demand the administration in his name, on furnishing the necessary security. In the administration of vacant successions, a different principle is established: the eventual and residuary rights of the heirs, who are absent and unknown, are to be protected by a counsel of absent heirs, whom it is the duty of the court to appoint, and whose functions do not expire until the heirs make their appearance, or until the

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curator is finally discharged. He is required to represent the absent heirs, not only in the inventory, but in all the acts required by law to be done. We do not think ourselves authorised to extend the provision of the Code relied on, to cases not expressly embraced by it, and particularly to a case, where the distinction is so obvious.

The opposition of E. Hayes, which we are next to consider, was founded on the allegation, that he is the largest creditor of the succession, that the other applicants, except Chew, are unfounded in their pretensions, that they are not *bonâ fide* creditors of said succession, and that if they present any claims, which are entitled to be considered debts, they are not the owners of them: that the same have been transferred by persons, who had no right to transfer them, and in addition to this, the transfers are simulated and without consideration, to enable the applicant M. P. Flint, to obtain the curatorship of the estate.

A transferee of claims against a succession for collection, is but a mandatory, and if the transfer is simulated, that is a mandate in disguise for the purpose of obtaining a curatorship, it cannot operate to the prejudice of *bonâ fide* creditors.

This opposition is based upon a better right, than that of the applicant, if it be true, that Hayes is a real creditor, and Flint only a fictitious one; for we cannot doubt, (without inquiring at this time, into the question much discussed in the argument, whether the transferee of a debt be a creditor of *the deceased*, as contradistinguished from a creditor of *the estate*,) but that the law intended to confer the curatorship on a real *bonâ fide* creditor, in preference to one who is only nominally so, and who acts merely as a person interposed. If the application of Hayes, did not come too late, our opinion is, that it shows on the face of it, a case which, if the facts are taken as true, would entitle him to the preference, if he possesses, in other respects, the necessary legal qualifications. A transfer merely for the purpose of collection, is but a mandate, and if the transfer in this case be simulated, that is, a mandate in disguise, for the purpose, as it is alleged, of obtaining the curatorship, it cannot operate to the prejudice of *bonâ fide* creditors, in their own right, who have really something to gain or loss by the admission or rejection of their claims. As a mere mandatory, we have already said, he can have no legal preference, and if he be not in truth and

in fact the owner, although nominally so, he is not a creditor in relation to other creditors, in a contest for the curatorship.

But the judge below rejected or refused to receive the opposition, on the ground, that it came too late; that more than ten days had elapsed since the publication of the notice of application by Flint, after which the Code forbids any opposition to be made. The only evidence of the notice having been published and advertised, appears in the record, to be endorsed beneath the order of the judge, in these words, "which petition was duly advertised, on the day of the filing thereof." This is extracted from the minutes of the court.

The Code requires a publication in the gazette, as well as a notice at the door of the court house, and it is made the duty of the judge to make these publications. C. P. 968, 969.

The publication thus provided for, is to operate as a constructive notice to all persons, having a right to make opposition, and as in all cases of constructive notice, it must be strictly proved. It is true, it is the duty of the judge to give notice, but it does not, in our opinion follow, that an entry in the minutes of the court, stating the fact, is evidence of the fact, as relates to persons to be affected by such notice, and is to conclude them. The party who claims the advantage of such notice, is bound, in our opinion, to show it. In this case, it was not shown, by sufficient legal evidence, and we think the court erred in refusing to receive the opposition.

The court cannot forbear to add, that the scramble too common in our courts, in which gentlemen of the bar are interested, in relation to the administration of estates, the struggles *per fas et per nefas*, which mark these contests; the protracted delays which attend them, regardless of the rights of honest, and it may be of suffering creditors, are calculated to defeat the ends of justice, and reflect no credit on the profession.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates, be annulled, avoided and reversed; that the case be remanded, with instructions to the

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The law requires applications for curatorships of vacant successions, to be published in the gazette, as well as a notice at the door of the court house, and it is made the duty of the judge to make these publications.

Publication of applications for curatorships is to operate as a constructive notice to all persons having a right to make opposition, and as in all cases of constructive notice, it must be strictly proved.

An entry on the minutes of the Probate Court stating the fact, that a publication of an application for a curatorship was made, is not evidence of the fact as relates to persons to be affected by such notice.

The party claiming the benefit of a publication of an application for a curatorship, is bound to show it was duly made.

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judge, not to refuse to receive, and act upon the opposition of E. Hayes, unless the appellee shows the publication of the notice according to law, and that so far as it overruled the opposition of Chew, the judgment of the Court of Probates be affirmed, with costs in both courts. The costs of the appeal, as to E. Hayes, to be paid by the appellee.

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THEREOF PRESIDING.

The writ of execution must pursue the judgment. But if the judgment be in itself vague and uncertain, it may be rendered certain by reference to the pleadings.

When a writ of possession is directed to a sheriff, a copy of the judgment, and a copy of the petition to which it refers, must accompany the writ, in order that the officer may not be mistaken in the premises, of which he is to give possession.

So in a possessory action, when the premises in contest are so vaguely described in the pleadings, that they cannot be designated with any certainty, and the verdict and judgment are general, "that the plaintiff recover possession of *the land sued for*," they will be set aside as being too vague, and the cause remanded for a new trial.

This is a possessory action, in which the plaintiff alleges, he is owner of a tract of land, of ten arpents front, by the usual depth, on Bayou Robert, and that he has been in the quiet possession of it, for more than a year, and in the actual occupation and cultivation of the same, until recently, the defendant invaded his premises, and forcibly and violently took possession of a *part of said tract*, without any legal authority.

He alleges, he has sustained five hundred dollars damages, for which he prays judgment, and that he be restored to the possession of such part of his tract, as has been taken into possession by the defendant, and his costs.

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The defendant pleaded a general denial. He denies specially that he ever dispossessed the plaintiff of any part of his land; and avers, he is the actual owner and possessor of the land claimed, and has been in the possession thereof for many years; possession of a part being possession of the whole. He prays to be dismissed with his costs.

Upon these pleadings, the parties went to trial. Many witnesses were called, and testified on both sides, whose testimony was taken down in writing. But none of the testimony designated the precise amount or quantity of land, the possession of which was in contest. No diagram or survey of the disputed premises, was made. The cause was submitted to a jury, who found a general verdict for the plaintiff, and six and one-fourth cents in damages. Judgment was rendered on the verdict, "that the plaintiff recover the land sued for," and that he be quieted in the possession thereof, and recover six and one-fourth cents damages, and costs. The defendant appealed.

Dunbar, for the plaintiff, explained the case, and insisted the verdict and judgment must stand, and that the plaintiff shall be put in possession of the contested premises.

2. The evidence shows, that the plaintiff was in possession, more than a year preceding the disturbance, and that the defendant pulled down his fences, and took forcible possession of the disputed premises.

Barry, for the defendant, contended, that the judgment in the case was entirely indefinite, and decided nothing between the parties. The case must therefore be remanded for a new trial.

2. On the merits of the case, the defendant is entitled to judgment, quieting him in the possession of the land, as he claims it.

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So in a possessory action, when the premises in contest are so vaguely described in the pleadings, that they cannot be designated with any certainty, and the verdict and judgment are general, "that the plaintiff recover possession of *the land sued for*," they will be set aside as being too vague, and the cause remanded for a new trial.

This is a possessory action, in which the plaintiff alleges, he is owner of a tract of land, of ten arpents front, by the usual depth, on Bayou Robert, and that he has been in the quiet possession of it, for more than a year, and in the actual occupation and cultivation of the same, until recently, the defendant invaded his premises, and forcibly and violently took possession of a part of said tract, without any legal authority.

He alleges, he has sustained five hundred dollars damages, for which he prays judgment, and that he be restored to the possession of such part of his tract, as has been taken into possession by the defendant, and his costs.

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The defendant pleaded a general denial. He denies specially that he ever dispossessed the plaintiff of any part of his land; and avers, he is the actual owner and possessor of the land claimed, and has been in the possession thereof for many years; possession of a part being possession of the whole. He prays to be dismissed with his costs.

Upon these pleadings, the parties went to trial. Many witnesses were called, and testified on both sides, whose testimony was taken down in writing. But none of the testimony designated the precise amount or quantity of land, the possession of which was in contest. No diagram or survey of the disputed premises, was made. The cause was submitted to a jury, who found a general verdict for the plaintiff, and six and one-fourth cents in damages. Judgment was rendered on the verdict, "that the plaintiff recover the land sued for," and that he be quieted in the possession thereof, and recover six and one-fourth cents damages, and costs. The defendant appealed.

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Boyes, on the same side, went into an argument, to show the true nature of possessory actions, and the principles upon which they rest. In this case he insisted, the judgment was so vague and uncertain, that it would be impossible for the sheriff to execute it, by putting the party in possession.

2. The officer could not execute a writ of possession, without becoming the arbiter between the parties, which would lead to new disturbances, and end in additional law-suits.

3. The pleadings are so loose and vague, and the evidence, as taken down by the clerk, so confused and uncertain, as to afford no guide for the execution of the judgment.

4. In our system of jurisprudence, as well as by the common law, when the pleadings are loose and indefinite, so much so as to leave the matter in contest uncertain, the verdict and judgment cannot stand. *Bacon's Ab. verbo verdict.*

Thomas and Winn, for the plaintiff, in conclusion.

Bullard J., delivered the opinion of the court.

This is a possessory action, in which judgment being rendered on a verdict against the defendant, he appealed. The appellant relies, principally for a reversal of the judgment, on the ground, that both the petition and judgment are so vague and uncertain, that no writ of possession can be issued and enforced, without leaving to the clerk and the sheriff, a discretion not given them by law.

The petition sets forth that the plaintiff has been in quiet possession as owner, for more than one year, of a tract of land, containing *about* four hundred and thirty-five arpents, having a front of about ten arpents on the Bayou Robert, it being the same formerly owned by Job Ruth. He states, that his possession of a part of the premises, within his clearing and actual cultivation, has been recently invaded by the defendant. He prays that he may be restored to his possession of so much of said premises as were in his possession, and has been forcibly taken by the defendant. The verdict was

a general one in favor of the plaintiff, and assessed his damages at six and a fourth cents; and the judgment pronounced thereon, was, "that the plaintiff have judgment against the defendant, for the possession of the land sued for, and that he be restored to, and quieted in the possession thereof."

The contest appears to have related to a very small part of the land possessed by the plaintiff, so trifling indeed in extent, that without being cumulated with a demand for damages, it could hardly form the object of an appeal to this court.

The general rule, that the writ of execution must pursue the judgment, will not be disputed. If the judgment be in itself, vague and uncertain, it may be rendered certain, by reference to the pleadings. 3 *Martin, N. S.* 7. In a case like this, the Code of Practice provides, articles 630 and 631, that the writ of possession shall be directed to the sheriff, with a copy of the judgment, and even a copy of the petition to which it refers, to the end that the sheriff may not be mistaken concerning the nature of the estate and appurtenances, of which he is to give possession. The law, therefore, requires, at least a reasonable certainty, and never intended that the rights of parties after a judgment pronounced, should depend, at least, upon the discretion of the sheriff. Suppose in this case, the writ to issue, with a copy of the petition and a copy of the judgment. The sheriff, it appears to us would be greatly at a loss how to proceed. He would be compelled to apply for information to some body. Is he to summon witnesses, or address himself to the parties? In either case, the cause is to be tried over again by the officer sent to execute the judgment of the court.

To this, it is answered, that the defendant ought to have excepted to the petition, as too vague and uncertain, and that he is precluded by the judgment, and that he has no right to complain that the judgment cannot be executed for uncertainty. That he might have declined answering to the merits, until the cause of action was more explicitly set forth, may be true, but it does not, in our opinion, follow, that, when that uncertainty is not cured, either by the verdict or the judgment, he is bound to submit without objection. Parties

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The writ of execution must pursue the judgment; but if the judgment be in itself vague and uncertain, it may be rendered certain by reference to the pleadings.

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So in a possessory action, when the premises in contest are so vaguely described in the pleadings that they cannot be designated with any certainty, and the verdict and judgment are general that "the plaintiff recover possession of the land sued for," they will be set aside as being too vague, and the cause remanded for a new trial.

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have a right to require their rights to be adjudicated upon in such a manner, as that the judgment rendered, may be a bar to a future action for the same thing, and, as will not necessarily expose them to the exercise of an arbitrary discretion on the part of the officer charged with execution.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled and reversed, the verdict set aside, and the cause remanded for a new trial, and that the appellee pay the costs of the appeal.

7L	410
41	800
7L	410
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104	810
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e118	345

THOMAS vs. BAILLO.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE PARISH
JUDGE OF THE PARISH OF RAPIDES PRESIDING.

Where a motion was made to dismiss the suit, because a copy of the petition was not served on the defendant in the French language, his vernacular tongue, the plaintiff was permitted at the same time to amend, by filing a copy of the petition in the French language, and having it served on the defendant.

The Code of Practice does not pronounce the absolute nullity of a petition or pleadings, defective in form only; the nullity is relative, and the party has a right to amend his pleadings.

In a possessory action, where the defendant alleges in his answer, that he purchased the disputed premises from the government, and assumes to call on the government to warrant his possession, the court will disregard this part of the answer, and all the evidence that goes to establish or invalidate titles on both sides.

The strict and legal inquiry in a possessory action is, "was the plaintiff the actual possessor, as alleged by him, and did the defendant disturb him and take possession."

The court is forbidden to give any weight to evidence in a record, which is foreign to the question at issue. WESTERN DIST.
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In a possessory action, when the judgment describes the contested premises with sufficient accuracy, to enable the sheriff to execute a writ of possession, accompanied with a copy of the judgment, without exercising a dangerous discretion, the judgment will not be disturbed.

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This is a possessory action. The plaintiff alleges, he was in the peaceable possession of a tract of deadened and cultivated land, in the parish of Rapides, situated on both sides of the bayou Toro, more than three years before instituting this suit, when in February, 1832, the defendant, by forcible entry and detainer, ousted him of his possession, by which he has sustained damages, to the amount of three thousand dollars. He prays judgment for his damages, and to be restored to the quiet possession and enjoyment of the premises, and that the defendant be enjoined from any further disturbance.

The defendant pleaded a general denial; and that he had been about four years, in the peaceable possession of a tract of seven hundred acres of land, embracing the part now in contest, which he purchased from the government of the United States, and had a right to call the latter in warranty, and connect its possession with his own, which he does, and prays to be quieted in the possession of the whole of said tract of land.

The defendant's counsel moved to dismiss the suit, on the ground, that a copy of the petition was served on the defendant in English, when the French language was his vernacular tongue. The plaintiff, at the same time, moved to file an amended petition, and have a copy of the petition in the French language served on the defendant. The motion to dismiss was overruled, and the plaintiff's motion to amend his petition sustained, and a bill of exceptions taken by the plaintiff's counsel, to the opinion of the court.

The parties went to trial on these pleadings and issues.

M^r Crummen (parish surveyor), a witness sworn for plaintiff, says he surveyed the land in controversy, in 1828, by instruc-

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tions from the United States government, for the plaintiff, which was included in a tract of forty arpents front on both sides of Bayou Toro. Plaintiff asked witness, if he did not survey this land for him as claimant, under the confirmation of the United States government; to which witness replied in the affirmative, (excepted to.) Plaintiff being the claimant to the land under confirmation from government, witness was instructed to require of him the payment of the surveyor's fees, which were paid accordingly.

Blundell, one of the chain carriers, testified, that the surveyor laid off the tract of forty arpents front on both sides of bayou Toro, which included all the cleared and deadened land, &c.

McCrummen, cross-examined, says, in 1830 or 1831, at the request of the defendant, he traced out sectional lines, partly within the limits of the survey made for the plaintiff, as above stated, which land defendant claimed, under a purchase from the United States government, (excepted to.)

Gillard, witness for defendant, says, he entered the land in controversy, for the defendant, in the land office, the 27th December, 1830. Defendant took possession of the land, in February, 1831, and in April following, placed some hands on it, to deaden timber, &c.

Several other witnesses were called, and examined on both sides, touching the possession, and the part of which the plaintiff complains he was dispossessed.

The parish judge, who presided in the place of the district judge, who recused himself, gave judgment, restoring the plaintiff to the possession of the land claimed by him; designating his boundary and limits, and quieting him in the possession thereof; and decreed him the sum of one hundred and twenty dollars, in damages with costs. The defendant appealed.

This case was argued by *Mr. Thomas*, in *propria persona*, on the part of the plaintiff, and by *Mr. Wim*, for the defendant.

Ballard, J., delivered the opinion of the court.

The first question presented in this case, for our solution, is whether the court erred in refusing to dismiss the petition, on the motion of the defendant, on the ground, that the French language was the vernacular tongue of the defendant, and the petition should have been served in that language; and in allowing the plaintiff to amend, by filing a copy in French, and having a citation in that language served. It appears from a bill of exceptions in the record, that the defendants counsel moved the court orally, (the making of which motion orally, was expressly agreed to by the plaintiff) to dismiss the suit on the ground the French language is the vernacular tongue of the defendant, which fact was admitted, and that, thereupon, the plaintiff moved for leave to amend by filing a copy of the petition in French, and to have a citation served in that language.

This motion, we suppose, is to be considered as an exception, and it is contended by the defendant, that it is a peremptory one, which precluded any amendment, and which could only be followed by a dismissal of the suit. The article 172 of the Code of Practice enacts, "that the petition when either party speaks the French language, as a mother tongue, must be drawn in the French and English languages." The same expression, "*must be*," is applied to all the required forms and particulars of a petition, such as the names, surnames and places of residence of the parties. But the Code does not pronounce the absolute nullity of a petition defective in these particulars. The nullity is, therefore, only relative, and the defendant has undoubtedly a right to require the petition and citation, to be in both languages, on showing that his native language is French," but it does not necessarily follow, that the suit must be dismissed. The Code authorises amendments, even after issue joined, under certain restrictions, for the ends of justice; and it does not appear to us the court erred in this case, in allowing the amendment, and ordering a further service to be made on him. If the action had become prescribed before the second service, it would present a serious question, which service would be con-

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Where a motion was made to dismiss the suit, because a copy of the petition was not served on the defendant in the French language, his vernacular tongue, the plaintiff was permitted at the same time to amend by filing a copy of the petition in the French language and having it served on the defendant.

The Code of Practice does not pronounce the absolute nullity of a petition or pleadings defective in form only; the nullity is relative, and the party has a right to amend his pleadings.

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sidered as interrupting the prescription. That question does not arise in this case, because a year had not elapsed between the act complained of in the petition, and the date of the second service; and an answer was filed at the subsequent term, in which prescription of the action is not pleaded. In relation to an exception, founded on a defect in the petition, analogous to this, we held that the amendment was properly allowed. 6 *La. Reports*, 380.

The petition sets forth, that the defendant had dispossessed the plaintiff of a tract of deadened and cultivated land, on both sides of the Toro, in the parish of Rapides, which he had possessed quietly and uninterruptedly, for more than three years, and he prays to be restored to the possession of the premises, with damages.

The defendant in his answer, denies all the facts and allegations relied on by the plaintiff, and further alleges, that he has been, for about four years, in the peaceable, uninterrupted and continued possession, of about seven hundred acres of land, which he derived from the government, by purchase, "and he has the right to call the government in warranty, and to connect the possession of the government with his own, which he does; he prays judgment against the plaintiff, and that he may be quieted in his possession of the whole of the land, purchased from the government," &c.

The action is strictly possessory, and in relation to questions of title and the nature of the evidence to be admitted, we are governed by the positive enactments of the Code of Practice.

"The plaintiff in a possessory action, needs only, in order to make out his case, to prove that he was in possession of the property in question, in the manner required by this Code, and that he has been either disturbed or evicted, within the year previous to his suit. So that when the possession of the plaintiff, or the act of disturbing him is denied, no testimony shall be admitted, except as to the fact of the possession, or as to the act of disturbance," and all testimony relative to property shall be rejected." *Code of Practice*, article 53.

"When the possession of the plaintiff is accompanied with all these circumstances, it matters not whether he possesses

in good or in bad faith, or even as an usurper, he shall nevertheless be entitled to his possessory action." *Code of Practice, article 49.* WESTERN DIST.
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The circumstances here referred to, are that he should have been in the real and actual possession at the instant when the disturbance occurred, that he should have had that possession for more than a year, with one or two exceptions; that he should have suffered a real disturbance either in fact or law, and that he should have brought his suit at least within the year.

With principles so clearly announced as our guide, we cannot be mistaken in saying, that we are bound to disregard, altogether, that part of the answer which alleges a purchase from government, and assumes to call on the government to warrant the possession of the defendant, and all that evidence which goes to establish, or to invalidate titles on both sides, and to confine ourselves to the single inquiry, was the plaintiff the actual possessor, as alleged by him, and did the defendant disturb him and take possession?

The cause was tried in the court below, without the intervention of a jury, and as all the evidence is in the record, it is not necessary to notice any further, the bills of exceptions. We are forbidden to give any weight to that which is foreign to the question at issue. The court gave judgment in favor of the plaintiff, and the defendant appealed.

The facts that Pamplin had possessed an enclosed field, for several years, as the tenant of the plaintiff, and cultivated it; that on the first of January, 1832, it was leased to Glenn, who took possession, and began to work on it; that in the temporary absence of his hands, the defendant came with, or sent his hands, and took possession, went on to cultivate it, and still retains possession, are abundantly proved. That adjoining this field, a large deadening had been made by the plaintiff, which was nearly fit for cultivation, was shown to the satisfaction of the court below. The extent of the premises thus possessed, is shown by the evidence. The enclosed land produced in 1831, about thirty bales of cotton. The possession of other lands in the neighborhood, on the part of

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In a possessory action, where the defendant alleges in his answer that he purchased the disputed premises from the government, and assumes to call on the government to warrant his possession, the court will disregard this part of the answer, and all the evidence that goes to establish or invalidate titles on both sides.

The strict and legal inquiry in a possessory action is, "was the plaintiff the actual possessor as alleged by him, and did the defendant disturb him and take possession?"

The court is forbidden to give any weight to evidence in a record which is foreign to the question at issue.

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In a possessory action, when the judgment describes the contested premises with sufficient accuracy to enable the sheriff to execute a writ of possession, accompanied with a copy of the judgment, without exercising a dangerous discretion, the judgment will not be disturbed.

the defendant, which, for aught that appears, the plaintiff had no interest in contesting, and the numerous records of suits in the record, in relation to other lands, are foreign to this inquiry. On a careful examination of the evidence, we are not enabled to say, that the court erred in its conclusion.

But it is contended that the judgment is so vague and uncertain, that it cannot be executed. On referring to the judgment, we find that the premises are minutely described, so as to enable the sheriff to execute a writ of possession, accompanied with a copy of the judgment, without exercising a dangerous discretion. We have had occasion to examine that subject at the present term, in the case of *Williams vs. Kelso*, ante 406, and we refer to the opinion in that case, for the view of the court upon that question.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

The defendant being dissatisfied with the decision and judgment of the court, presented a petition for rehearing. On considering and examining the petition, the court made the following modification of its judgment :

Bullard, J.

In this case a rehearing has been prayed for, and a minute examination of the evidence in the record, leaves a doubt in our minds, whether the building of a cabin within the deadened land, in 1831, amounted to a disturbance of the plaintiff, and if so, how far the actual possession of the defendant extended, before February, 1832, at the time he took possession of the enclosed land.

On this point, a rehearing is granted.

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HAWKINS
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**APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.**

Redhibitory defects or vices which are made known, by the vendor to the vendee, at or before the sale, cannot be urged in avoidance, or in any manner set up against the sale.

Parole evidence is admissible, to prove the declarations of a vendor, in relation to the redhibitory vices of slaves, at or before the sale.

The mere legal agent, appointed to sell property, by authority of law, has no powers but those conferred by law.

It is the duty of auctioneers, to receive the conditions of sale in writing, from the vendor, and to read and proclaim them, in a loud and audible voice, to the bystanders, and invite bids, in conformity therewith.

The administrator of an estate, is the legal vendor of the property at probate sale, whose declarations are to govern, in regard to its conditions and terms, and the legal warranty resulting therefrom.

The sale of property legally made by the administrator, binds the heirs in warranty.

The conversations of bystanders, at a probate sale, with a purchaser, in which he is apprised of redhibitory vices in the property, before it is bid off, will not be admitted to exclude the legal warranty claimed, unless they go to establish the fact, that the redhibitory vices complained of, had been declared by the vendor to the purchaser.

The crier's declarations at a probate sale, unauthorized by the vendor, are inadmissible in evidence, to show the buyer was thereby apprised of the redhibitory vices in the property sold, before he bid for it.

The plaintiff sues as the representative and administrator of the estate of Thomas Grimball, deceased, to recover the amount of a note of three hundred and seventy dollars, and one of fourteen dollars and twelve and a half cents, executed by the defendant, Brown, as principal, and Flint as his surety. The plaintiff alleges, that the first note was given as a part of the price of two slaves, purchased by Brown, at the sale of Grimball's succession.

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The defendants severally excepted, and denied that the plaintiff was administrator, as he represents himself to be, which exceptions were overruled.

Brown admitted the execution of the notes, but alleged the slaves, for which one of the notes was given in part payment, were afflicted with redhibitory vices, which rendered them valueless, &c.

Flint admitted he signed the notes sued, as surety of his co-defendant, and set up the same defence.

The evidence shows, that the slaves, for which the note of three hundred and seventy dollars was given in part payment of the price, were purchased at the probate sale of Thomas Grimbail's succession, by *Brown*. One of them sold for seven hundred and eleven dollars, and the other for four hundred dollars. *Flint* endorsed the notes for his co-defendant, and finally took the slaves into his possession.

The defendants claim a rescission of the sale, on account of redhibitory defects in the slaves, at the time they purchased them.

"*Stafford*, sworn for plaintiff, says, he attended the sale of Thomas Grimbail's succession. That Joseph Scott and Joseph Boon cried the sale of the negroes in question. *Witness* was told by *Mr. Grimbail*, to tell *Boon*, who was crying the negroes, that one of them, (naming him) was not sound, which was proclaimed by *Boon*. Judge Scott, the parish judge, was present, but appeared unwell. These slaves were not sold for near as much as others, on account of their sickness and defects. *Witness* told *Brown*, that one of the slaves was sickly, had a bad cough, and discharged blood. This was the day before the sale, and he told him the same thing on the day of sale. *Witness* would have bid three hundred dollars more for him, had he been sound. *Witness* bid five hundred dollars for the boy. The negro himself told *Brown*, he had a bad cough and discharged blood. The other negro is crippled, and was so at the time of sale."

The defendants in a supplemental answer, alleged, that the crippled slave was "*a runaway and great thief*." The proof supported this allegation. It also appeared from the testimo-

ny of several witnesses, that the other slave was sickly and incapable of rendering much service.

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The conversations of two or three persons with Brown, before, and at the time of the sale, were introduced in evidence, to show that he was apprised by a physician, who examined the slaves, that they were defective, on account of redhibitory vices. This testimony was excepted to by the defendants.

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There was no tender of the slaves in accordance with the prayer for a rescission of the sale. The jury returned a verdict for the plaintiff. After an unsuccessful effort to obtain a new trial, judgment was rendered in conformity to the verdict. The defendants appealed.

Winn for the plaintiff.

1. The defendants have never tendered the slaves, in order to have a rescission of the sale, and it is now out of their power to return them. They cannot claim a rescission of the sale, before this is done; until the vendee offer to return the slave, he cannot have an action for the price, and by consequence, for the rescission of the sale. 4 *La. Reports*, 198.

2. It appears by Stafford's testimony, that Mr. Grimball, (one of the heirs) told him to tell the crier, that one of the slaves was not sound, which was proclaimed by the crier. Now the Code declares, that the buyer cannot maintain the redhibitory action, if the seller has declared the vice to him before, or at the time of the sale. *La. Code*, 2498.

3. Testimonial proof is admissible and competent evidence of the declarations of a vendor or seller at a sale. This part of the Code has been adjudicated on by this court. *La. Code*, 2498. 6 *Martin, N. S.* 539.

4. The testimony of Stafford goes fully to show the slaves were unsound, and sold and declared to be so, at the sale. He expressly says, he would have bid three hundred dollars more, for one of them, had he been sound.

5. The auctioneer was, in this sale, the agent of the estate of Grimball, acting too as a ministerial officer, making a probate sale, and for all legal purposes, in reference to the present case, was the seller.

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6. Heirs are subject to the same legal warranty, to which a vendor is subject, and they ought not to be precluded from showing, by testimonial proof, that the redhibitory defects were declared to the buyer, at and before the sale. *La. Code*, 2602, *vide also*, chap. 10, § 2, *under the title of sale*.

7. The provisions of the Code, which require that the vendor or seller, shall give to the auctioneer in writing, the conditions and terms of sale, who is to proclaim them, do not exclude the privilege conferred by article 2458, of showing, by testimonial proof, that the redhibitory defects were declared. *La. Code*, 2584.

8. Redhibition is defined to be the avoidance of a sale, on account of some defect or vice in the thing sold, that it must be supposed the buyer would not have purchased, had he known the vice. The *argumentum in contrario sensu*, forces the construction, that if the buyer did know of the existence of the defects, and purchased with his eyes open, he must abide the consequences. Testimonial proof is admissible to show this knowledge in the buyer, and which is shown in this case.

Flint, for the defendants, insisted, that testimonial proof could not be received, to contradict the *procès verbal*, or written sale of these slaves. There is no mention made of the redhibitory defects being declared by the seller or auctioneer, in the *procès verbal* of this sale, which must be conclusive on this point.

2. It was not necessary to tender the slaves expressly, in praying for a rescission of the sale. In answering to the suit, a tender is necessarily involved, when a rescission of the sale is claimed and set up in the defence.

Martin J., delivered the opinion of the court.

The defendants being sued for the price of two slaves, purchased by Brown, at the sale of Thomas Grimbail's estate, by order of the judge of probates, resisted the claim, on account of alleged redhibitory defects and vices in the slaves

thus purchased. Judgment was rendered against them for the amount claimed, and they appealed.

The counsel for the defendants and appellants, has drawn the attention of the court, to a bill of exceptions taken to the admission of evidence, of the declarations of a person, whom the parish judge called to his aid at the sale, as a crier; and of conversations of several persons, with one of the defendants, while the sale was actually going on.

The counsel for the plaintiff contends, that the declarations of the crier were properly admitted, as they were made in presence of the parish judge, and by the directions of a person by the name of Grimball, whom he alleges, was one of the heirs.

The Louisiana Code, article 2498 provides, that, the vendee cannot urge redhibitory defects, which were made known to him by the vendor, at or before the time of sale; and authorises parole evidence of these declarations.

The plaintiff further contends, that the parish judge, acting as auctioneer, was the agent of the vendor, and as such, his declarations are those of the latter; that an auctioneer may employ a crier, whose statements proclaimed and declared to the bystanders or the company, are considered as proclaimed by the auctioneer himself, and consequently by the vendor, whose agent the auctioneer is, in such cases.

The Louisiana Code, article 2495, requires the auctioneer, after having received the conditions of the sale in writing, from the person offering the property for sale, to read and proclaim them in a loud and audible voice to the company, and then invite bids in conformity to those conditions.

Auctioneers, especially those living out of New-Orleans, and in the several parishes where there is no auctioneer but the parish judge, are not, strictly speaking, the *chosen*, though they may be the *legal* agents of the vendor; and we doubt whether they be more than the legal agents, in places in which there are two or more auctioneers. The mere legal agent, has no authority, but that which the law confers.

The written conditions, which the Louisiana Code seems to require, cannot certainly be changed, without the posterior

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Redhibitory defects or vices which are made known by the vendor to the vendee, at or before the sale, cannot be urged in avoidance, or in any manner set up against the sale.

Parole evidence is admissible to prove the declarations of a vendor in relation to the redhibitory vices of slaves at or before the sale.

It is the duty of auctioneers to receive the conditions of a sale in writing from the vendor, and to read and proclaim them in a loud and audible voice to the bystanders, and invite bids in conformity therewith.

The mere legal agent appointed to sell property by authority of law, has no powers but those conferred by law.

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The administrator of an estate is the legal vendor of the property at probate sale, whose declarations are to govern in regard to its conditions and terms, and the legal warranty resulting therefrom.

The sale of property legally made by the administrator binds the heirs in warranty.

The conversations of bystanders at a probate sale with a purchaser, in which he is apprised of redhibitory vices in the property before it is bid off, will not be admitted to exclude the legal warranty claimed, unless they go to establish the fact that the redhibitory vices complained of had been declared by the vendor to the purchaser.

The crier's declarations at a probate sale unauthorized by the vendor, are inadmissible in evidence to show the buyer was thereby apprised

act of the vendor, and he who contends, that such an act has taken place, must show it.

In the present case, it appears, that the parish judge called on a person then present, to aid him in crying the sale. It is also shown, that a person by the name of *Grimball*, who was present at the same time, directed that the crier might proclaim and declare to the company, the redhibitory defects in the slaves, which are now complained of, and which he did, in the presence of the parish judge.

The sale was provoked by Hawkins, the administrator of Grimball's estate, of which the slaves in question constituted a part. The auctioneer or parish judge, was bound to read and proclaim the written conditions of sale, given to him by Hawkins, the administrator. It is to them we are to look, in order to ascertain whether the legal warranty, on which the defendants rely, and claim the benefit, was excluded or not. The administrator was the vendor. His sale, it is true, bound the heirs of Grimball to the legal warranty; but this court is not ready to say, that if any of the heirs had directed the declarations, concerning the redhibitory vices to be made by the auctioneer or crier, the purchaser would not have been bound thereby. But we are compelled to say, that no declaration made by a stranger, can have the same effect.

The conversations of bystanders, with either of the defendants, were in the opinion of the court, improperly admitted to exclude the legal warranty relied on, and the benefit of which is claimed by the defendants, unless they tended to establish the fact, that the redhibitory vices complained of, had been declared by the vendor to the defendants.

In all cases of a trial by jury, the party claiming it, is entitled to a verdict, uninfluenced by illegal evidence. According to this principle, the case must be remanded for another trial.

This renders it unnecessary for the court, in the present state of the case, to examine any of the other questions or points of law, arising in the cause.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and

reversed ; the verdict set aside, with directions to the court, not to allow parole evidence of the crier's declarations, unauthorised by the vendor, or of the conversations of bystanders, with the defendants, unless they tend to show, that the redhibitory defects and vices in the slaves, were declared by the vendor to the vendee, before, or at the time of the sale ; the costs of the appeal to be borne by the plaintiff and appellee.

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of the redhibi-
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property sold
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it.

REPORTS
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CASES ARGUED AND DETERMINED
 IN
THE SUPREME COURT
 OF
THE STATE OF LOUISIANA.

EASTERN DISTRICT.
NEW-ORLEANS, DECEMBER, 1834.

FOUCHER vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An absconding debtor cannot apply for the benefit of the insolvent laws and make a surrender of his property, by an *attorney in fact*. No man can swear by proxy, unless expressly authorised by law; and the attorney in fact cannot swear, that no part of the insolvent's property has been diverted to the injury of his creditors, which is essential in the affidavit.

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The judge is not authorised to order a stay of proceedings, either against the person or property of an insolvent debtor, and to accept the cession, so as to bind all the creditors, without a compliance on the part of the insolvent debtor, with the *essential* forms of law.

A person's owning a saw-mill and brick-yard, as an appendage to a sugar plantation, and selling the bricks and plank, does not constitute him a *trader*, within the meaning of the 6th section, of the act of 1826, relating to forced surrenders of property.

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This suit was instituted in the name of the plaintiff, by his attorney in fact, to obtain the benefit of the insolvent laws, relative to a voluntary surrender. The petition states, that the plaintiff, Antoine Foucher, jr., is a resident of the parish of Jefferson, *but now absent*, and represented by E. Faures, his attorney in fact; that owing to bad crops, payment of heavy interest, and losses, he is unable to pay his debts; he annexes a schedule of his affairs, and prays leave to surrender his property to his creditors, that it be accepted, and all other proceedings against it be stayed.

The schedule was sworn to, by the attorney in fact, and the district judge accepted the cession of the property, ordered a meeting of the creditors before a notary, and that all proceedings against the property be stayed.

After this order was granted, a portion of the creditors of Foucher, presented a petition for a forced surrender of his property, under the 6th section of the act of 1826, alleging that he is a *merchant or trader*, who has absconded or concealed himself, to avoid the payment of his debts, and praying for a meeting of creditors, in pursuance of that act.

The petition was accompanied by a motion, to set aside the former proceedings, on the following grounds:

1. That the schedule and petition are not sworn to.
2. That the petitioner had absconded, before the granting of said order.
3. That the petitioner is a fraudulent debtor.
4. The property left by said insolvent, will not be sufficient to pay one-third of his debts.
5. That a cession of property cannot be made by an attorney in fact.

The facts proved are, that the plaintiff had absconded to avoid a criminal prosecution for forgery, and was absent at the time the application was made for a surrender; that he had a sugar plantation, and a small plantation adjoining to it, near the city of New-Orleans, on the latter of which, he had a sugar-mill, saw-mill and brick-yard, the produce of which,

consisting of sugar, plank and scantling, and bricks, he was in the habit of selling, either on his plantation or in the city.

The district judge was of opinion, that the circumstance of Foucher's having a steam saw-mill and brick-yard, in connexion with his sugar plantation, and selling planks and bricks, did not constitute him a *merchant or trader*, refused the application for a forced surrender. He also considered, that although Foucher was not himself entitled to the benefit of the insolvent law, yet a surrender of the property might be made, for the benefit of his creditors; and therefore overruled the motion to set aside the order accepting the surrender. The creditors appealed.

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Derbigny for the plaintiff, in support of the surrender, contended, that if the insolvent debtor acted fraudulently, or was not himself entitled to the benefit of the insolvent laws, still his property surrendered, whatever might be his fate, remains the pledge of his creditors, and is to be distributed among them.

2. It is objected by the opposing creditors, that the schedule cannot be sworn to by the attorney in fact of the debtor. This objection can go no further, than to deprive the debtor of the personal advantages resulting from the surrender; but unless it is clearly shown that the agent, in ceding the property, has violated the law, or exceeded his authority, he has vested in the creditors all the rights of the debtor, to the property surrendered.

3. The property surrendered by the insolvent debtor, may be retained by his creditors, notwithstanding his bad faith.

4. If there is no express law authorising this proceeding, the cession must be maintained on general principles of equity; for in civil matters, when there is no express law, the judge is bound to proceed, and decide according to equity. *La. Code, article 21.*

Rost, for the opposing creditors, made the following points:

1. The judgment of the District Court is unsupported and unfounded in law, and ought to be reversed, and the application of the creditors for a forced surrender admitted.

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This schedule must be signed by the debtor, if he can write, and sworn to or affirmed. The fifth section gives the form of the oath to be taken : among other things, he is required to swear, that "he has neither directly nor indirectly, diverted any of his property, to the injury of his creditors." By the act supplementary to that above mentioned, approved March 29th, 1826, the judge, to whom such petition has been presented, in the mode and form required by the original act, is authorised to accept the cession of property.

An absconding debtor cannot apply for the benefit of the insolvent law, and make a surrender of his property, by an attorney in fact. No man can swear by proxy, unless expressly authorised by law ; and the attorney in fact cannot swear, that no part of the insolvent's property has been diverted to the injury of the creditors, which is essential in the affidavit.

It appears to us clear, that unless the debtor complies with all the preliminary formalities required by these statutes, the judge is without authority, either to order proceedings to be stayed, or to accept the surrender. No man can swear by proxy, unless expressly authorised by law, and even if he could, an essential part of the affidavit has been omitted, to wit, that no part of the property of the debtor, has been diverted to the injury of his creditors. An absconding debtor might, without much violence, be presumed to have carried off some means with him. Whether he absconded to avoid the payment of his debts, or the punishment demanded by law for his crimes, is not material.

But it is said, that although Foucher may not be entitled to his discharge, under the insolvent laws, yet he may make a surrender to his creditors, for their common benefit, by his attorney in fact ; he may surrender to them their common pledge, and that they may go on and administer it. This may be true, if the creditors all consent. But this opposition shows the dissent of a part of them ; and the question is, has the district judge a right, under such circumstances, to accept the surrender for all the creditors, and to restrain them in the prosecution of the claims against the common debtor ? We are of opinion, that the judge had not authority to order a stay of proceedings, either against the person or property, and to accept the cession, so as to bind all the creditors, without a compliance on the part of the insolvent, with the essential forms of law. It is true, the property of the debtor is the common pledge of his creditors, but it does not follow, that one creditor has a right to interfere in all cases, in the

The judge is not authorised to order a stay of proceedings, either against the person or property, of an insolvent debtor ; and to accept the cession, so as to bind all the creditors, without a compliance on the part of the insolvent debtor, with the essential forms of law.

pursuit of another, to be paid out of the common fund. The law favors the vigilant, by giving to recorded judgments the rank of mortgage; and one creditor could not restrain another from proceeding to judgment, against their common debtor, under the pretext, that he would thereby obtain a preference.

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The opposing creditors further asked from the court of the first instance, a sequestration of the property of Foucher, as an absconding merchant or trader, under the sixth section of the above mentioned act, of 1826. This was refused, on the ground, that the absconding debtor is not a merchant or trader. The correctness of this judgment, is also contested on the appeal.

In the year 1823, the legislature abolished the forced surrender, as it existed by the Spanish law, and restricted the right of compelling a surrender, to cases when the debtor should be in actual custody.

The act of 1826, reinstated it only in relation to merchants or traders, who should abscond or conceal themselves, in order to avoid the payment of their debts. The principal question is one of fact, is Foucher a merchant or trader, according to the true intent and meaning of the statute? The statement of facts shows, that he has a plantation at a small distance above the city of New-Orleans, where he resided; that he has thereon a sugar-mill, a great quantity of cane, and also a steam saw-mill, a water saw-mill, and a brick-yard; the sugar, lumber, and brick were sold, either on the plantation, or in the city; and that he bought rafts for said saw-mills.

It is extremely questionable, whether even under the bankrupt laws of England, Foucher would be considered as a trader, within the statutes. One authority says, "a man's buying and selling, brings him not within the statutes, for they intend, such as gain the greatest part of their living thereby." *Bacon's Abr. verbo Bankrupt*. No very precise rule, has been laid down in England. But in this state, we are to take words in their usual sense. It seems to us, that having a saw-mill and brick-yard, as an appendage to a sugar plantation, and selling the brick or plank, does not

A person's owning a saw-mill and brick-yard, as an appendage to a sugar plantation, and selling the bricks and plank, does not constitute him a trader, within the meaning of the 6th section of the act of 1826, relating to forced surrenders of property.

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constitute the proprietor a trader. No man perhaps ever imagined, before the absconding of Foucher, that he was a merchant or trader; and if we make one of him now, it can be done only by implication. It is impossible to say where we are to stop, if we once deviate from the broad distinction, obvious to common sense, between a planter, who profits by the labor of his slaves, and his own industry, partly in raising crops, and partly in some mechanical or manufacturing branch of industry, and the merchant or trader, who lives by buying, and selling for a gain. In the first case, it is principally labor, which affords the profit; in the second, it is capital invested and kept in circulation, without adding any value to the articles bought and sold. We think the judge did not err, in refusing the sequestration.

But it is said, if neither of these modes of proceeding is sanctioned by law, the parties are without remedy, and the property will be wasted by protracted litigation, among the creditors, and unequally distributed. We cannot help that. It is not our business to legislate, nor to remedy defective enactments of the legislature. Our judgments ought to form rather the development, than the supplement of legislation.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be reversed, so far as relates to the original order, and that the order of the court, accepting the surrender, and directing a stay of proceedings and a meeting of the creditors, be rescinded and annulled, and that the appellee pay the costs of both courts.

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STEVENSON vs. SHIELDS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a partnership is composed of several partners, and by the articles of agreement, one of them is to be a silent partner, the others cannot, by mutual consent, before its expiration, dissolve the partnership, without the consent of the silent partner,

Where a partner sues the acceptor of a bill, endorsed by the payee to the partnership firm, and the plaintiff sues in his own name, for the use of the firm, which he alleges, is composed of himself and another, but is dissolved by mutual consent, and it appears by the articles of partnership, there was a silent partner, who had not consented to the dissolution: *Held*, that the action cannot be maintained, because the interest of the silent partner in the bill, by the endorsement to the firm of which he was a member, could not be divested without his consent.

The moment a bill of exchange is endorsed, by the payee, to a partnership firm, it becomes the joint property of all the partners.

This is an action against the acceptor of a bill of exchange, for one thousand eight hundred and seventy-six dollars, drawn by one Page, a silent partner of the firm, in behalf of which the plaintiff sues.

The plaintiff sues for the use of the late firm of J. G. Stevenson & Co., which he alleges, was composed of himself and one M'Carty, and had been dissolved by mutual consent.

The defendant pleaded a general denial.

The articles of partnership, which were produced in evidence, showed that the firm of John G. Stevenson, & Co., was composed of J. G. Stevenson, P. M'Carty and S. K. Page, the latter a silent partner. The notice of dissolution showed it was made before the partnership expired by its own limitation, and *without* the consent of the silent partner. The bill of exchange sued on, was endorsed by the payee to the firm of J. G. Stevenson & Co.

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The district judge, after examining the evidence of the case, was of opinion, the firm of Stevenson & Co. had not proved property in the bill, or shown they paid a valuable consideration therefor: gave judgment of non-suit. The plaintiff appealed.

Sterrett, for the plaintiff.

1. It was not necessary to prove ownership of the bill sued on, as it is endorsed to the firm, in behalf of which the plaintiff sues, and because the ownership was not specially denied, and the possession is not alleged to be illegal.

2. It was not necessary to show the consideration which was paid for the bill, as it is not specially denied or pleaded.

3. The plea of payment set up on the trial, comes too late, and cannot avail. There is no evidence of payment to either of the ostensible partners of said firm.

Worthington, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff sues in his own name, for the use of the late firm of J. G. Stevenson & Co., composed of himself and P. M'Carty, upon a bill, of exchange, drawn upon the defendant, by him accepted, and protested for non-payment, at its maturity.

The defence set up in the answer, is that the defendant is not liable, in the manner and form stated in the petition, and that the plaintiff exhibits no right or title to maintain the action.

Where a partnership is composed of several partners, and by the articles of agreement one of them is to be a silent partner, the others cannot by mutual consent, before its expiration, dissolve the partnership without the consent of the silent partner.

The bill was drawn by page, payable to the order of Commayer, and by him endorsed in full to John G. Stevenson & Co. We leave out of view the subsequent endorsement to Sprague, cashier, because it is not an endorsement by Stevenson & Co., but by J. G. Stevenson alone.

The view which we have taken of the right of the plaintiff, to maintain the present action, according to the conditions of the partnership, and its subsequent alleged dissolution by mutual consent, renders it unnecessary to

examine other questions, raised in the argument, and the several grounds filed, upon which the appellant seeks to reverse the judgment of non-suit, rendered below.

The articles of partnership are signed by Stevenson, M'Carty and Page, and the style of the firm composed of those three partners, is declared to be J. G. Stevenson & Co. They agree upon a division of profits, in different proportions, between the three partners, and the firm was to continue until the 1st of July, 1834, unless sooner dissolved by mutual consent. By the seventh article, it was provided, that Page should have "the privilege of being a silent partner in the firm; he will not be required to direct his attention *openly*, to the business in New-Orleans, but he will, during his absence from, as well as during his residence in the city, do all in his power to procure business, that may be considered profitable to the firm," &c.

Page was, in the opinion of the court, a partner, without whose consent the firm could not be dissolved, before the time limited by the agreement. The notice of dissolution adduced in evidence, is signed only by the two other partners. The interest of Page in the bill of exchange, under the endorsement to J. G. Stevenson & Co., could not be divested without his consent, and accrue, as alleged by the plaintiff, to the conclusive benefit of Stevenson and M'Carty, although Page himself, in his individual capacity, was the drawer of the bill. The moment it was endorsed to the firm, it became the joint property of all the partners.

The plaintiff does not, therefore, show a right, either in himself, or those for whose use he sues, to recover the amount of the acceptance.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Where a partner sues the acceptor of a bill endorsed by the payee to the partnership firm, and the plaintiff sues in his own name for the use of the firm, which he alleges is composed of himself and another, but is dissolved by mutual consent, and it appears by the articles of partnership there was a silent partner who had not consented to the dissolution: *Held*, that the action cannot be maintained, because the interest of the silent partner in the bill by the endorsement to the firm of which he was a member could not be divested without his consent.

The moment a bill of exchange is endorsed by the payee, to a partnership firm, it becomes the joint property of all the partners.

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GOTTSCHALK
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MADAME GOTTSCHALK vs. HER CREDITORS.

APPEAL FROM THE PARISH COURT FOR THE CITY AND PARISH OF
 NEW-ORLEANS.

A married woman, separated in property from her husband, and who is not even a public trader or merchant, has the right to claim the benefit of the insolvent laws, which authorise a cession of property, for the benefit of creditors, by a debtor in embarrassed and insolvent circumstances.

The plaintiff alleges, she is separated in property from her husband, and that owing to many losses, and diminution in the value of her property, she is unable to pay all her debts. She annexes a schedule of her affairs, and prays that she be allowed to make a cession of her property, for the benefit of her creditors, and a meeting of them be called; and that all proceedings against her person and property, in the mean time, be stayed.

The schedule was sworn to, and the usual affidavit made. The judge accepted the surrender. Abat and Delachaise, who were judgment creditors, appealed.

Rowert, for the plaintiff, contended:

1. That by the first and second sections, of the act of February 20th, 1817, and by the first and second sections, of the act of March 29th, 1826, every individual, every insolvent debtor, not imprisoned for debt, can avail himself of the benefit of said acts, that in no part of said acts, is there any exception, express or implied, which excludes free women, who are not public trading women, from the benefit of said acts.

2. That by the fortieth section, of the act of 1817, it is expressly declared, that "no free girl or woman shall be imprisoned for debt, nor in virtue of this act, unless she be a public trading woman, or in consequence of some crime or misdemeanor," which express exception in favor of women,

not public trading women, liberating them from a part of the provisions of said act, clearly shows that the balance of said act, is fully applicable to them, and that they have the right to receive the full benefit thereof.

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D. and J. Seghers, for the appealing creditors:

1. Neither the provisions of the act of the 20th February, 1817, relative to the voluntary surrender of property, or the supplemental act thereto, of March 29, 1826, are applicable to women, unless they are public traders or merchants.

2. The fortieth section of the act of 1817, provides, that women cannot be imprisoned, and consequently they do not come within the meaning of the 1st, 2d, or 27th sections of said act, nor within the 1st section of the act of 1826.

3. Women cannot be subjected to the provisions of the 9th or 21st sections of the act of 1817, providing against fraud, or concealment of the person or property of the debtor from the creditors, and for punishing it.

4. The Spanish law, relating to a forced surrender, would have applied to this case, but these laws were repealed by legislative enactment, in 1823. See 2 *Moreau's Digest*, 436.

5. The laws of Rome and Spain, exempted women from imprisonment for debt. The same provision exists in France, except as to women who are public traders. *Novelle*, 134, ch. 9. *Merlin's Repertoire*, verbo *contrainte par corps*, No. 1 and 16. *Law of Toro*, 62. *Febrero ad.*, part 2, b. 3, ch. 2, No. 160.

6. According to these laws, it will appear, that the sole object of the judicial surrender, being to liberate the debtor from imprisonment, this privilege does not apply to women. *Febrero ad.*, part 2, b. 3, ch. 3, No. 1 and 2. *Leclercy, droit Romain comparé au droit Français*, vol. 4, p. 144, 371.

Mathews, J., delivered the opinion of the court.

The only question presented by this case, appears somewhat novel. It is, whether a woman, not a public trader or merchant, has a right to claim the benefit of our insolvent laws, which authorise a cession of property, for the

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benefit of creditors, by a debtor who may find himself in embarrassing circumstances? This question was decided in the affirmative, by the court below, from which the opposing creditors took the present appeal.

The legislative acts of the state, which are the only laws in force, since 1828, on the subject now under consideration, make no distinction, as to the right of debtors to surrender their property, on the score of sex. But it is contended, on the part of the appellants, that in consequence of the humane and gallant disposition of our laws, which exempt women from imprisonment, on account of contracts, they are not entitled to the benefits secured to honest and unfortunate debtors, by a *cessio bonorum*.

Such interpretation, would certainly exhibit palpable discordance with that benevolent feeling, which dictated the rule, exempting women from personal arrest and imprisonment, on account of civil obligations, and unless the law be express and imperative in denying this right, it ought not to be so construed as to produce such an incongruous effect.

The reasoning in favor of the negative proposition, that women have no right, under our laws, to make a surrender of their property, for the benefit of their creditors, as used by the advocate in the present instance, is somewhat syllogistic in form. The insolvent laws, as shown by the 1st section of the act of the 20th March, 1817, and by the provisions of the act of 1826, on the same subject, were passed for the purpose of enabling debtors to avoid imprisonment, by surrendering their property, &c. A woman cannot be imprisoned, on account of her debts; therefore a woman has no right to make a surrender.

This mode of reasoning certainly receives aid from the maxim *cessante ratione cessat et ipsa lex*; and were it shown, that this is the sole benefit and relief intended by these laws, the reasoning would be very forcible, if not conclusive. But, on reading the section of the act referred to, the cession of goods has the effect, not only to prevent imprisonment, it also releases the debtor from all proceedings against his

person. This latter clause, if it have any meaning different from the exemption from imprisonment, must mean a release from all personal actions; so that a person, who does all things in his power to pay his creditors, by a fair surrender of property, may not be harrassed by a multiplicity of suits. This in truth, under circumstances of impossibility to make payment of all his debts, by a debtor, is the only means of giving effect to that provision of our code, which declares the property of a debtor to be a common pledge to all his creditors. The effects of a surrender of property, in practice, has always been, to stop all judicial proceedings against the ceding debtor, except such as are carried on in the *concurso*.

We are unable to perceive any cogency in the reasoning, based on the impossibility of punishing a woman, ceding her property as a debtor, by imprisonment, on account of fraud in the surrender. The same difficulty would exist, in making her act honestly, in pursuits by creditors separately, when she refused to make a cession of her property. Indeed, a willingness shown, to give all up for the benefit of the mass of creditors, is at least *prima facie* evidence of honesty and fair dealing.

The law does not positively and expressly inhibit women from surrendering their property to creditors, neither can such inhibition be made out, by just reasoning from the context of the law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs, to be paid by the appellant.

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A married woman, separated in property from her husband, and who is not even a public trader or merchant, has the right to claim the benefit of the insolvent laws, which authorize a cession of property, for the benefit of creditors, by a debtor, in embarrassed and insolvent circumstances.

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STATE VS. JUDGE WATTS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The judiciary act of 1789, while it gives to the federal courts, exclusive original cognizance, of all civil causes of admiralty and maritime jurisdiction, reserves to parties, in all cases, the right of a common law remedy, when the common law is competent to give it.

The states are prohibited from establishing courts, having cognizance of cases of admiralty and maritime jurisdiction, according to the course of proceedings in courts of admiralty, but if parties choose to sue upon their contracts, according to the rules of practice established by law, in courts of general jurisdiction, instead of proceeding summarily, by motion or *ex parte*, in the admiralty courts, there is nothing in the constitution which prohibits them.

The adjustment of accounts, among part owners of ships, relating to profits, is a matter of chancery, and not admiralty jurisdiction, in England.

According to the laws of Louisiana, the adjustment of profits and settlement of accounts, among joint owners of ships, is a necessary incident to the action of partition.

Admiralty courts, in the United States, may, in some cases, have ordered a sale of vessels, at the suit of part owners, but it does not follow, as a necessary consequence, that the state courts are without jurisdiction in the same matters.

So the part owner of a vessel, within the jurisdiction of the state courts of general jurisdiction, may institute suit therein, to compel a partition of his interests, and recover a balance for advances made, by a judicial sale or licitation of the vessel, even when such co-proprietor resides out of the state.

This case commenced by an application for a mandamus, to compel the judge of the First Judicial District, to entertain jurisdiction of a certain suit, instituted in his court.

The record shows, that Levi H. Gale, filed his petition in the District Court, alleging that he was one-fourth owner of the ship *Atlantic*, then lying in the port of New-Orleans, and

that Isaac Purrington, residing in the state of Maine, was owner of the remaining three-fourths; that Purrington was indebted to him in the sum of four thousand three hundred and twenty-seven dollars, for advances made, on account of said vessel. He prays for a partition of his interest, by a sale or licitation of the ship, after an inventory, and appraisement is made; that a *curator ad hoc* be appointed to defend Purrington, and that he have judgment against him for his aforesaid claim.

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The district judge endorsed on the petition, that he considered this case as belonging, exclusively to the courts of admiralty, and declined its jurisdiction.

A rule was taken on the judge, to show cause why a mandamus should not issue. The judge returned for answer, that he viewed the subject matter in litigation, as exclusively of admiralty and maritime jurisdiction, and that under the constitution and laws of the United States, original cognizance of all civil causes of admiralty and maritime jurisdiction, appertained exclusively to the courts of the United States. In support of this opinion, he cited the constitution of the United States, and laws, and referred to *Conklin's Practice in United States Courts*, page 141 to 150, and note to page 148. *Bee's Admiralty Reports*, 2.

Skidell, in support of the rule, contended, that the action of partition lies between all parties who may hold property in common, from whatever cause it is so held. *La. Code*, art. 1231.

2. Under the general admiralty law, one-part owner, cannot compel the other part owners of a vessel, to sell their shares. *Abbott on Shipping*, page 90-91.

3. If the courts of the United States, in the exercise of their admiralty jurisdiction, have the power to compel the sale of a vessel, on the application of a part owner, this jurisdiction, in such matters, is not exclusive; it may be exercised by the state courts, if permitted or authorised by the local law. 1 *Kent's Commentaries*, page 351-2.

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Bullard, J., delivered the opinion of the court.

A rule having been taken on the judge of the First Judicial District, to show cause why a *mandamus* should not issue, commanding him to make certain preliminary orders, in the case of *Gale vs. Purrington*, he shows for cause, that he considers the subject matter to be adjudicated upon, as exclusively of admiralty and maritime jurisdiction, and that under the constitution and laws of the United States, the exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, appertains to the courts of the U. States.

In order to ascertain the precise question, of which the district judge declined to entertain jurisdiction, we must recur to the petition presented to him in the first instance. Here we are then to inquire, whether the cause of action, as set forth, be one of admiralty and maritime jurisdiction, and if so, whether it be of that class of cases, of which exclusive cognizance has been granted to the federal judiciary, by the constitution and laws of the United States.

The plaintiff, L. H. Gale, sets forth in his petition, that he is proprietor in common with Isaac Purrington, of the state of Maine, of a ship or vessel called the *Atlantic*, of which Purrington owns three-fourths, and the plaintiff the other fourth. That the ship is now within the jurisdiction of the court. That the petitioner is unwilling to remain longer in a state of indivision with his co-proprietor, and that no other means exist of effecting a partition of their interests, than by a judicial sale or licitation. He further represents, that Purrington is largely indebted to him, for advances and disbursements made on account of the ship for which suit is now pending; and he finally prays for the appointment of a curator *ad hoc*, to represent the absent defendant, that an inventory and appraisement may be made in due form of law, and that the vessel may be sold, after due notice, and that he may be paid for his advances, out of the share of his co-proprietor.

The action, therefore, is one of partition, and the object to be partaken, is a registered vessel, belonging in different proportions to part owners, citizens of different states, and the

question is, not whether the owner of a minor share, can, at any time, compel a severance of their joint interests, but whether the state courts are forbidden to take cognizance of such a question, by the constitution of the United States.

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The constitution declares, that the judicial power of the union, shall extend to certain classes of cases, not now necessary to enumerate, and among others, "to all cases of admiralty and maritime jurisdiction." It is now generally conceded, that this grant of power, does not necessarily and in all cases, confer exclusive jurisdiction on the courts of the United States, but that the state courts retain, in many of the enumerated cases, concurrent jurisdiction in the first instance. The first judiciary act, organising the federal courts, provides for the manner in which the decisions of state courts may be reversed by writ of error to the Supreme Court of the United States, and for the removal of causes for trial, in the first instance, in certain cases, on the defendants complying with certain formalities. Whether the constitution has vested the federal tribunals, with exclusive cognizance, of all cases of admiralty and maritime jurisdiction, is a question upon which distinguished commentators entertain different views. Judge Story, in his commentaries on the constitution, divides the cases of admiralty and maritime jurisdiction, into two great classes; "one dependant upon locality, and the other upon the nature of the contract. The first, respects acts or injuries done upon the high seas, where all nations claim a common right and common jurisdiction, or acts or injuries done upon the coast of the sea, or at farthest, acts and injuries done within the ebb and flow of the tide. The second, respects contracts, claims and services, purely maritime, and touching rights and duties appertaining to commerce and navigation. The former is again divisible into two great branches, one embracing captures and questions of prize arising, *jure bele*, the other embracing acts, torts and injuries, strictly of civil cognizance, independent of belligerent operations." 3 *Story's Com.* 527 and seq.

Another class respects contracts, claims and services purely maritime; such as the claims of, material, men, and others

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for repairs and outfits of ships, belonging to foreign nations, or to other states; bottomry bonds, for moneys lent to ships in foreign ports; surveys of vessels damaged by perils of the seas; pilotage on the high seas, and suits for mariners' wages. He adds, that, "in many of the cases included in these latter classes, the same reasons do not exist, as in cases of prize for an exclusive jurisdiction, and therefore, whenever the common law is competent to give a remedy in the state courts, they may retain their accustomed concurrent jurisdiction in the administration of it." *Ibid.* 533.

The judiciary act of 1789, while it gives to the federal courts, exclusive original cognizance, of all civil causes of admiralty and maritime jurisdiction, reserves to parties, in all cases, the right of a common law remedy, when the common law is competent to give it.

The states are prohibited from establishing courts, having cognizance of cases of admiralty and maritime jurisdiction, according to the course of proceedings in courts of admiralty, but if parties choose to sue upon their contracts, according to the rules of practice established by law, in courts of general jurisdiction, instead of proceeding summarily, by monition or *in rem*, in the admiralty courts, there is nothing in the constitution which prohibits them.

On the other hand, it would appear to be the opinion of Chancellor Kent, and of Mr. Rawle, that the jurisdiction of the federal courts, in cases of that kind, is necessarily exclusive. 1 *Kent's Com.* 351. *Rawle on the Constitution*, 202.

These opinions are, however, strongly combatted by the able and distinguished commentator first named, who remarks, that, "the reasonable construction of the constitution, would seem to be, that it conferred on the national judiciary, the admiralty and maritime jurisdiction, exactly according to the nature and extent, and modifications, in which it existed in the jurisprudence of the common law. Where the jurisdiction was exclusive, it remained so; where it was concurrent, it remained so. Hence, the states could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases, as were exclusively cognizable in admiralty courts. But the states might well retain, and exercise the jurisdiction, in cases of which the cognizance was previously concurrent, in the courts of common law." 3 *Story's Com.* 533, *in notes*.

Such, we believe, to have been the construction put upon the constitution, by the first congress, who enacted the judiciary act of 1789, which, while it gave to the federal courts, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, reserves to parties, in all cases, the right of a common law remedy, where the common law is competent to give it. The states are prohibited from establishing courts, having cognizance of cases of admiralty and maritime jurisdiction, according to the course of pro-

ceedings in courts of admiralty; but if parties choose to sue upon their contracts, according to the rules of practice established by law, in courts of general jurisdiction, instead of proceeding summarily, by monition or *in rem*, in the court of admiralty, we see nothing in the constitution which prohibits it; always reserving to the defendant, if he be a citizen of a different state, the right of having the cause removed to a court of the United States. Whether the case now under consideration, would be regarded in England, where the distinction between courts of admiralty, and courts of common law and equity, is clearly defined, as one of admiralty jurisdiction, is extremely questionable. Indeed it is said by Abbott, in his *Treaties on Shipping*, that the court of admiralty, cannot, in any case, compel any of the part owners, to sell their interest, but may protect the interest of the minority of part owners, by ordering security to be given; or taking a stipulation, as it is termed. Even that authority was long questioned, but it seems now to be settled. In a case, which is said to have terminated the controversy in England, the chief justice declared, "I have no doubt, but the admiralty has a power in this case, to compel a security, and this jurisdiction has been allowed to that court, for the public good. Indeed, the admiralty has no jurisdiction to compel a sale; and if they should do that, you might have a prohibition after sentence, or we may grant a prohibition against selling, or compelling the party to sell or to buy the shares of others." *Abbott on Shipping*, 74.

The adjustment of accounts among part owners of ships, relating to profits, is a matter of chancery and not of admiralty jurisdiction in England. Such adjustment or settlement of accounts, is according to our law, a necessary incident to the action of partition. The admiralty courts in the United States, may, in some cases, have ordered a sale of vessels, at the suit of part owners, as was done by the judge of the district of South Carolina, in the case to which our attention has been called, in 2 Bee's Reports, but it does not appear to us to follow as a necessary consequence, that the state courts are without jurisdiction of a case like the present. We are

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The adjustment of accounts, among part owners of ships, relating to profits, is a matter of chancery, and not admiralty jurisdiction, in England.

According to the laws of Louisiana, the adjustment of profits and settlement of accounts, among joint owners of ships, is a necessary incident to the action of partition.

Admiralty courts, in the United States, may, in some cases, have ordered a sale of vessels, at the suit of part owners, but it does not follow, as a necessary consequence, that the state courts are without jurisdiction in the same matters.

So the part owner of a vessel, within the jurisdiction of the state courts of general jurisdiction, may institute suit therein, to compel a partition of his interests, and recover a balance for advances made, by a judicial sale or licitation of the vessel, even when such co-proprietor resides out of the state.

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therefore, unable to concur in opinion, with our brother of the District Court, that the subject matter of this suit, is exclusively of admiralty jurisdiction.

Let the rule be made absolute.

BRIDGE & VOSE vs. MERLE ET AL.

**APPEAL FROM THE PARISH COURT FOR THE CITY AND PARISH OF
 NEW-ORLEANS.**

Where an appeal bond is executed, for one-half more than the amount of the judgment appealed from, and filed within ten days after the rendition of judgment, the appeal is suspensive as well as devolutive.

The jurisdiction of the appellate court attaches, as soon as the appeal bond is filed, and the court *a quo* has no longer authority to take any steps in the case, except such as are necessary to transmit and bring up the record.

An appeal must be made returnable within the next term of the Supreme Court, after it is taken, if there is time to cite the appellee; if not, then to the subsequent term thereafter. But the judge *a quo* cannot by a second order, extend the return day of the appeal, on the ground that the first day fixed, is not a judicial day.

When the term, to which a cause is made returnable, fails, the appellant may well file the transcript at the next term, within the *three judicial days after the return day*; but the citation must be regular to the return day, and the service in time.

The plaintiffs are appellants from a judgment, dismissing their claim and suit, and which gave to a seizing creditor, the sum claimed in the petition. They took a *suspensive* appeal, on the 26th June, 1834, returnable to the third Monday of July following, but no citation of appeal issued,

or was served on the appellee. On the third Monday of July, the appellants presented a petition to the parish judge, praying an extension of the return, which was fixed on the fourth Monday of November, to which day the appellee was cited accordingly.

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Slidell, for the appellee, took a rule on the appellants, to show cause why the appeal should not be dismissed, for not having been filed in time.

2. The return day fixed by the judge, was the third Monday in July, and the record was not filed until the 24th November following.

3. No citation was issued, or served to the return day first fixed, as is required by law. The order extending the return day, is a nullity, and the appeal must be dismissed.

Huffman, for the appellants, contended, that the want of a regular citation, did not require the appeal to be dismissed; but that the court might order an alias citation to issue. Several cases have been decided on this principle.

2. If the law authorises an alias citation, instead of a dismissal, the court will not compel the party unnecessarily, to be at the expense of a second appeal.

3. It is made the duty of the clerk, to issue the citation of appeal. If he fails, ought the party to suffer? *Code of Practice*, 582.

4. The party ought not to suffer for the negligence of the officers. The least the court can do, is to continue the cause, and order an alias citation. This they have done, and allowed the appellant to take out a new citation. 5 *Martin*, 500. 6 *Ibid.*, 1. *Vide sec. 9, judiciary act of 1813.* 1 *Martin's Digest*, p. 438, 440.

5. The Code of Practice has made no change in this rule or principle. The law is the same now, as it was when those decisions were made.

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Bullard J., delivered the opinion of the court.

The appellee moves to dismiss this appeal, on the ground, that it has been irregularly brought up, not having been filed in time.

Judgment was rendered on the 18th of June, and on the 26th, a petition of appeal was presented; the appeal allowed, on the appellant giving bond with security, in the sum of fifteen thousand dollars; appeal made returnable on the third Monday of July following. On the same day a bond was filed, in conformity to the order of the judge.

Where an appeal bond is executed, for one-half more than the amount of the judgment appealed from, and filed within ten days after the rendition of judgment, the appeal is suspensive as well as devolutive.

The jurisdiction of the appellate court, attaches, as soon as the appeal bond is filed, and the court *a quo*, has no longer authority to take any steps in the case, except such as are necessary to transmit and bring up the record.

The effect of this order is first to be considered. The appeal had been taken, and bond given, within ten days after the rendition of the judgment. It was consequently suspensive as well as devolutive. The jurisdiction of the appellate court attached, as soon as the bond was filed; and the court of the first instance, had no longer authority, to take any steps in the case, except such as are necessary to transmit the record to the appellate court. That principle has been uniformly recognised by this court. 6 *Martin, N. S.* 464. 8 *Ibid.*, 440. 4 *La. Reports*, 205.

If a citation of appeal had been issued, in pursuance of the order, returnable on the third Monday of July, it would have appertained to this court, to decide whether a proper return day had been fixed by the judge. But no such citation issued. On the contrary, the citation in the record, requires the appellees to appear on the fourth Monday of November.

After the bond had been filed, and the appeal allowed, to wit: on the 14th of July, the appellant applied by supplemental petition of appeal, to the parish judge, representing that there was not sufficient time, to take up the appeal as ordered, and praying an order, extending the time for taking it up. An order was accordingly given, extending the return to the fourth Monday of November, and on the 7th of November following, a citation was issued accordingly.

The Code of Practice, article 574, makes it the duty of the judge, allowing the appeal, to fix the day on which it shall be returned, and in fixing the day, he is to be guided

by article 583, which provides that "the appellee must be cited to appear before the court of appeal, at its next term, if there be sufficient time for doing so, after allowing the same delay which is granted to defendants in ordinary cases; and if there be not sufficient time to admit of the appellee having this delay, owing to the distance from his domicile to the place where the court of appeal is held, he shall be cited to appear before the same, at the subsequent term."

The return day must, therefore, be within the term next to the time at which the appeal is allowed, if there be time to give the appellee the legal delay, considering his distance from the court; if not, then within the subsequent term. From the 26th of June, to the third Monday of July following, a day within the July term of this court, there was sufficient time, although the appellant may not have had time, on the 14th of July, when the supplemental petition was filed, to cite the appellee for the third Monday of the same month. We are bound to regard the second order of the judge as a nullity.

But it is contended, that as the court adjourned early in July, and was not in session on the third Monday, the return day might well be extended to the subsequent term, and was in fact extended, by operation of law. In the case of *Rost vs. St. Francis Church*, the court held, that when the term failed entirely, the appellant might well file the transcript at the next term, within the three first judicial days, after the return day fixed by the order of appeal. 5 *Martin, N. S.* 191.

But in that case the citation was regular, and the service in time; in this no citation issued, in conformity to the order of the judge. If it had, the appellants might well have filed the transcript, within the first three judicial days after the return day; but the judge was not authorised to extend the return day, on the supposition that the one first fixed by him, would not be a judicial day.

It is, therefore, ordered, that the appeal be dismissed, at the costs of the appellants.

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An appeal must be made returnable within the next term of the Supreme Court, after it is taken, if there is time to cite the appellee; if not, then to the subsequent term thereafter; but the judge *quo* cannot, by a second order, extend the return day of the appeal, on the ground that the first day fixed is not a judicial day.

When the term to which a cause is made returnable fails, the appellant may well file the transcript at the next term, within the three judicial days after the return day; but the citation must be regular to the return day, and the service in time.

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POWELL
vs.
SINNOTT.

POWELL vs. SINNOTT.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the plaintiff has been allowed two hundred and fifty dollars, as a referee to adjust the accounts of an estate, he cannot recover of the syndic, a commission on the amount of the estate so adjusted, when there is no evidence, of any extraordinary services having been rendered by him.

This is an action, to recover of the defendant, as syndic of the estate of James Lambert, five per cent. commission, on forty-four thousand seven hundred and sixty-three dollars, as a compensation for his services, in arranging, settling and adjusting the accounts of said estate. He alleges, he was employed by the defendant, expressly to perform this service, and that he is entitled to demand the commission claimed.

The defendant pleaded a general denial; and that the syndics had rejected this claim, as not authorised, and refused to put it on the tableau, which was homologated without any opposition from Powell. He denies that he is personally liable, and prays to be dismissed.

The evidence showed, that the plaintiff had been allowed two hundred and fifty dollars, on the tableau of distribution of Lambert's estate, by the syndics, as a referee.

The plaintiff produced in evidence, a paper, purporting to be a statement of the account and amount of Lambert's estate, signed "James Powell for syndics," by which it appeared, the estate amounted to forty-four thousand seven hundred and sixty-three dollars. On this sum he claims the commission sued for. There is no evidence of any other service being rendered. He made no opposition to the tableau filed by the syndics, on account of the claim.

There was a verdict and judgment for the defendant. The plaintiff appealed.

Keene, for the plaintiff and appellant.

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Hennen, contra.

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vs.
SHEROTT.

Bullard, J., delivered the opinion of the court.

This suit was instituted by the plaintiff, to recover of the defendant, in his individual capacity, compensation for services, alleged to have been rendered by him, in arranging and adjusting for final settlement, complicated and intricate accounts of an estate, of which the defendant claimed to be, and was acting as syndic, which services were rendered at the request of the defendant. The defendant puts in the general denial, and further pleads, that he is not personally liable; that he acted as syndic, jointly with T. Bickel, now deceased, and that the plaintiff presented his claim for services, to the syndics, who disallowed it, and refused to put it on the tableau, which was finally homologated, without opposition on the part of the plaintiff.

The case was submitted to a jury, in the court below, who found a verdict for the defendant, and the plaintiff appealed, without any effort to procure a new trial.

The evidence shows, that the plaintiff was allowed, on the tableau of distribution, a sum of two hundred and fifty dollars, as one of the referees, in a case in which the estate was interested, and the account made out by him, and signed "for syndics," refers to the same case. But we find no evidence in the record, of the extraordinary labor and pains, bestowed on the investigation of complicated accounts, upon which the plaintiff rests his right to recover in this case, and nothing which authorises us to disturb the verdict.

Where the plaintiff has been allowed two hundred and fifty dollars, as a referee to adjust the accounts of an estate, he cannot recover of the syndics a commission on the amount of the estate so adjusted, when there is no evidence of any extraordinary services having been rendered by him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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GORMLEY ET AL.
vs.
OAKLEY ET ALS.

GORMLEY ET AL. vs. OAKLEY ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In a sale *per aversionem*, with reference to known definite boundaries, they will control the enumeration of quantity, and the purchaser is not entitled to a diminution of price, proportioned to a diminution of quantity.

So where a sale is made, with reference to a natural boundary on one side, and on the other two sides by lands of the adjoining proprietors, and the length of all the lines are given, *on a plan* annexed to the conveyance, and the whole is sold for a gross sum : *Held*, that it is a sale *per aversionem*, and the purchaser bought whatever is embraced within those limits, and nothing more, although *less* than the quantity specified as sold in the act of sale.

The vendor, when called in warranty, in a sale *per aversionem*, is not bound to make good the quantity of land, specified in the act of sale, but only the extent and quantity contained within the defined limits, by which he sold.

The vendor is not bound to warrant what he never sold; and when the vendee has not been evicted of any part of the land sold, which was conveyed by certain definite boundaries, he cannot recover of his warrantor, although the quantity actually sold, was less than that set forth in the deed.

This was originally an action of boundary, but under the pleadings, presents mixed questions of title, boundary and recourse in warranty.

The plaintiffs, William Gormley and John F. Miller, allege, they are the owners of a tract of land, in the parish of Jefferson, having three arpents, less two toises, front on Bayou des Cannes, the two lateral lines running back until they intersect, so as to contain ninety-two arpents and three hundred toises, superficial measure, which William Gormley purchased from Louis Foucher, by notarial act, the 2d of April, 1828, and which the latter obtained from Roffignac

and the executor of Cevallos, who purchased it from the Nuns, in the suburb Religieuses, by public act, dated August 9, 1810, "to whom it was confirmed by the government of the United States, with the dimensions aforesaid, according to a plan recorded in the land office, by which plan the Nuns sold to Roffignac and Cevallos, and by which they sold to Foucher, who by the same plan sold to Gormley."

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The petitioners further allege, that S. W. Oakley bought a tract of land, adjoining their lower line, from Trudeau & Livaudais, and claims about forty arpents of their land, pretending that his upper line runs so as to meet their upper line, at forty-two instead of sixty-six arpents from his front. They pray that Oakley be cited, and the boundary line between them fixed by a judgment, so that Oakley's line meet their upper line, at the distance of sixty-six arpents, and give them the forty superficial arpents in dispute; and that Foucher be called in warranty, to make good to them the ninety-two arpents and three hundred toises, according to their original purchase from him, in case they fail in recovering the forty arpents in contest, from Oakley.

Foucher pleaded a general denial, admitted the sale to Gormley, and averred, that the plaintiffs have ever since been in possession of all the property he sold and conveyed, in said sale. He calls Roffignac and Cevallos, his vendors, in warranty.

Roffignac appeared, and pleaded the general issue, and prescription.

Oakley averred, he claimed no more land than his titles called for, and was willing to settle the boundary line between him and the plaintiffs, according to his titles, and at their costs. He calls Trudeau and Livaudais, his vendors, in warranty.

Livaudais pleaded the general issue, and prescription.

Upon these pleadings the parties went to trial. The respective titles were produced in evidence, and the testimony of surveyors and other witnesses, to prove the boundaries, as they had been surveyed from time to time. The

EASTERN DIST. evidence is fully set forth, in the view taken of it by the
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The district judge after examining the evidence, came to the conclusion, that this is a disguised action, for diminution of price, by reason of a defect of quantity; that the plaintiffs have not been evicted of any thing, of which they were ever in possession; that the land purchased, was designated by the adjoining tenements, and sold from boundary to boundary; and the plaintiffs cannot recover more than is contained within the designated limits. Judgment was rendered, directing the boundary line to be run, according to the plan of Lafon, made in 1810, by which the premises were sold. The plaintiffs appealed.

Preston, for the plaintiffs.

1. The Nuns and Livaudais, established the boundary between them, and the courses of the lateral lines, of the part sold to Livaudais, which lines are demonstrated by the testimony of witnesses, (surveyors,) with mathematical certainty, to meet at ninety-two arpents from the river, or sixty-six beyond *Bayou des Cannes*, which gives the plaintiffs the quantity they claim.

2. The plaintiffs' vendor, Foucher, possessed and cultivated this tract, and had it confirmed to him by the sovereign authority of the United States government, for the quantity we purchased, and now claim as his vendees.

3. It is proved, the defendants have been in possession of a *fine* angle, for fifteen or twenty-five arpents in depth, of the land we claim. We care not for this, if they show they possessed it thirty years.

4. We claim forty arpents, to protect which, we want the boundary line run. It is swamp land, has been in the actual possession of no body, but has been constructively in our possession, according to the lines and courses given in Trudeau's survey, in 1780, and by Lafon in 1810, by the confirmation to Foucher, and all the sales afterwards.

5. The plaintiffs ask the court to fix the boundary between the parties, who both hold under a common vendor,

according to the boundary, courses and plan of Trudeau, in 1780. EASTERN DIST.
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Hennen, on the same side.

Pierce, Dennis and Soulé, *contra*.

Bullard, J., delivered the opinion of the court.

The plaintiffs allege, that they are owners, by purchase from Louis Foucher, of a tract of land, having a front on the Bayou des Cannes, of three arpents, less two toises, and running back until the two lateral lines come to a point, containing ninety-two arpents and three hundred toises, in superficies; that the defendant Oakey, is the proprietor of the tract adjoining the above, and sets up title to about forty arpents of their land, pretending that his upper line should run so, as to touch the land of the plaintiffs, at the distance of forty-two arpents from the front, instead of sixty-six arpents, which is the true depth of their tract, according to the original titles. They pray, that he may be cited, and that a boundary line may be judicially established, between their respective lands, in such a manner, as to give the plaintiffs a depth of sixty-six arpents, and that the forty superficial arpents claimed, may be decreed to be their property. They further pray, that their vendor, Foucher, may be made a party, and that if judgment should be rendered, in favor of the defendant Oakey, they may have judgment in warranty, for twenty thousand dollars.

The defendant, Oakey, denies that he has ever claimed more land than he is entitled to, avows his readiness to establish a boundary, provided it be at the costs of the plaintiffs, and sets up title to the land claimed by him, in the neighborhood of the plaintiffs, under a sale from Livaudais & Trudeau, whom he cites in warranty.

L. Foucher, the vendor of the plaintiffs, thus cited in warranty, denies their right of action against him, and alleges, that the plaintiffs are in possession of all the land, which he sold them, and that if they ever had any right of

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action against him, for a deficiency of quantity, which he denies, it is prescribed. In his turn, he calls in his vendor and warrantor, J. Roffignac, who answers by a general denial.

This state of the pleadings, presents for the consideration of the court, mixed questions of title, boundary and recourse in warranty. The rights of the plaintiffs, as well in relation to the defendant Oakey, as to their warrantor, depend upon the true construction and legal effect of the sale, from Foucher to Gormley, on the 2d of April, 1828, and of the certificate of confirmation, on the part of the United States. We come, therefore, at once, to the examination of those two evidences of title, as forming the basis of the pretensions of the plaintiffs, to the *locus in quo*.

The act of sale declares, that Foucher sells to Gormley, "all that tract or parcel of land, situated, lying and being in the suburb Religieuses, about one mile above this city, and on the same side of the river, as per plan hereunto annexed, and signed *ne varietur*, by the said contracting parties, and me notary, measuring three arpents, less two toises, front on the Bayou des Cannes, and running back from said Bayou, about forty-two arpents, more or less, and until the two lateral lines come to a point, and touch each other, the whole composing about ninety-two arpents three hundred toises, more or less, superficial measure; bounded on one side by property heretofore owned by Pierre Rousseau, deceased, and on the other side by property, owned at present, or heretofore owned by J. E. Livaudais," &c. The price is declared to be ten thousand dollars, payable by instalments, and the vendor declares, that he purchased the same tract from Joseph Roffignac, and the executors of Ciriaco de Cevallos, by act passed before Michel de Armas, notary public, on the 17th June, 1816.

The plan referred to in the act, and identified with it, by the signature of the parties, and the paraph of the notary, represents the premises as forming a triangle, with a base of eighty-eight toises and one foot, or one-sixth, on the Bayou des Cannes, equal to three arpents, less one toise and five-

sixths, one foot more than the deed calls for, and one of the side lines, which divides the tract from the land of veuve Parvis, as measuring eleven hundred and nineteen toises, from the base near the Bayou, and nineteen hundred toises, from a point not given, but presumed to be the river.

The other line is represented as twenty-three toises shorter. The certificate of the surveyor, does not express the superficial contents, but on the face of the plan it is stated to be ninety-two arpents and three hundred toises, and the sale in question, describes it as a tract of that extent. It is manifestly impossible it can contain that quantity, according to the limits and measurements furnished by the deed itself, and the certificate of the surveyor. This error can be accounted for only, by supposing that the surveyor multiplied the whole depth of nineteen hundred toises by one half the base on the Bayou des Cannes, instead of taking the true length of the side line from the base.

This sale appears to the court, clearly one *per aversionem*. This court has had frequently occasion to consider the principles which govern sales of that character, and it has been settled in several cases, that where a sale is made with reference to known and definite boundaries, they will control the enumeration of quantity. *Cuny vs. Archinard*, 5 *Martin*, N. S. 238. *Johnston vs. Quarles*, 3 *La. Reports*, 91. *Brand vs. Daumoy*, 8 *Martin*, N. S. 160.

In the case now before the court, the sale is made with reference to a natural boundary on one side, and on the two other sides by lands of the adjoining proprietors, and the length of all the lines of the triangle, are given in the plan annexed to the conveyance, and the whole is sold for a gross sum. The plaintiffs purchased whatever is embraced within those limits, and nothing more.

But the plaintiffs contend, that they have a certificate of confirmation, by the U. States, of their title, to the whole extent of ninety-two arpents and three hundred toises, and that being a title derived immediately from the sovereign, entitles them to recover that extent of land. It is true, the certificate in favor of Louis Foucher, describes the tract of land confirmed

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In a sale *per aversionem* with reference to known definite boundaries, they will control the enumeration of quantity, and the purchaser is not entitled to a diminution of price proportioned to a diminution of quantity.

So where a sale is made with reference to a natural boundary on one side, and on the other two sides by lands of the adjoining proprietors, and the length of all the lines are given on a plan annexed to the conveyance, and the whole is sold for a gross sum: Held, that it is a sale *per aversionem*, and the purchaser bought whatever is embraced within those limits and nothing more, although less than the quantity specified as sold in the act of sale.

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to him, as one of ninety-two arpents and three hundred toises, having a definite front on the Bayou des Cannes, with side lines converging to a point, without giving the length of those side lines. Taken by itself, it might be considered an abandonment of title on the part of the United States, to the superficial quantity expressed, and, as against the government, authorise an extension of the side lines, to such an extent as, with the definite front given on the Bayou des Cannes, would include that superficies. But as relates to the defendants, it may be answered: 1. That the plaintiffs in their petition allege, that the confirmation in question, was made with reference to the same plan by which the Nuns sold to Roffignac and Cevallos, and by which they sold to Foucher, and the last to Gormley. 2. That in the conveyance to Gormley, no reference is made to this certificate of confirmation, and if it really gave him, Foucher, the whole extent of ninety-two arpents and three hundred toises, yet he has never sold it to the plaintiffs. 3. The title to the whole of the Nuns' plantation, had been previously confirmed by the commissioners, and it is represented, as having a depth of only sixty-six arpents from the river, and yet, if the construction contended for by the plaintiffs be adopted, the same commissioners confirm, as a part of the same tract, a narrow strip, extending to the distance of about ninety arpents from the river.

The vendor, when called in warranty, in a sale *per aversionem*, is not bound to make good the quantity of land specified in the act of sale, but only the extent and quantity contained within defined limits, by which he sold.

The vendor is not bound to warrant what he never sold; and when the vendee has not been evicted of any part of the land sold, which was conveyed by certain definite boundaries, he cannot recover of his warrantor, although the quantity actually sold was less than that set forth in the deed.

On this part of the case, the court is, therefore, of opinion, that the plaintiffs have not shown title in themselves, to any land not embraced in the boundaries referred to in the act of sale, by Foucher to Gormley, and consequently cannot recover the forty arpents in controversy.

The remaining question, between the plaintiffs and their vendor in warranty, depends mainly on the principles already settled. The vendor is not bound to warrant what he never sold; and the plaintiffs have not been evicted of any part of the land which, according to our construction of the contract, was sold and conveyed to them, as within definite boundaries. It is true, it was declared in the deed, that the tract contained ninety-two arpents and three hundred toises, and there is a

deficiency of about forty arpents. In a case of such manifest error, an error which appears to have been common to all the parties, we are not prepared to say that the plaintiffs would not be entitled to any relief. But the only question now before the court, is one of warranty, and the liabilities of the vendor, as warrantor, must be measured by the contract of sale. Whether the purchasers, in a case like the present, would be entitled to a rescission of the sale, on the ground of error or fraud, is a question which the pleadings do not present for our solution. Whether the demand against Foucher, in the present action, be regarded as one for a diminution of price, on the ground of deficiency in the measure, or as a recourse in warranty, we are of opinion that he is not liable. Article 2471, of the Louisiana Code, declares that "there can be neither increase nor diminution of price, on account of disagreement in measure, when the object is designated by the adjoining tenements, and sold from boundary to boundary."

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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December, 1854.

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VS.
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BABIN ET ALA. VS. WINCHESTER.

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APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE PARISH
JUDGE, OF THE PARISH OF ASCENSION, PRESIDING.

The *procès verbal* of a sale, in which a mortgage is retained, made by the parish judge, acting as auctioneer, and duly recorded in the parish judge's office, is full evidence of the mortgage, which is binding on third possessors of the mortgaged property.

The identification of the note sued on, with a mortgage taken to secure its payment, may be shown by circumstantial and parole evidence, without the *paraph ne varietur*.

According to the rules of practice in force in 1816, which was before the adoption of the Code of Practice, a judgment by default became final, *ipso facto*, by the lapse of *three days*; and reasons are not necessary to the validity of such a judgment.

A judgment by default, which becomes final, by operation of law, does not require the signature of the judge to render it perfect and final.

In an action of warranty, prescription only runs from the date of eviction. If the action is commenced within ten years, it is in time to prevent prescription.

The action of mortgage is not barred by prescription, when commenced within ten years from the time when the debt became due and payable.

The third possessor, who is evicted, is entitled to recover of his vendor and warrantor, the value of his improvements put on the evicted premises, at the period of eviction.

This is an action of warranty, instituted by the heirs and legal representatives of Charles Babin, deceased, to recover one thousand eight hundred and seventy-five dollars, the price of three arpents of land by forty in depth, sold by the defendant to the ancestor of the plaintiffs, from which the latter was evicted, by a pre-existent mortgage. The facts of the case show, that, on the 27th April, 1813, this tract of land, then consisting of four arpents by forty, on Bayou Lafourche, was sold by order of the Court of Probates, at the instance of

the heirs of Nicholas Dublin, and E. Hernandez became the purchaser, for three thousand dollars, payable by instalments, for which he gave his notes, endorsed by Montserrat, with special mortgage. Two days afterwards, Hernandez sold the premises, by notarial act, to Montserrat, who bound himself to pay Dublin's heirs.

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Montserrat paid part of the first instalment, and gave his own notes for the balance, to one Doucet, curator of one of Dublin's heirs. Afterwards, on the 30th March, 1816, the land was sold by the sheriff, to pay Montserrat's notes, and Winchester, the present defendant, became the purchaser.

On the 9th of April, 1818, Winchester sold and conveyed the land to Charles Babin, for two thousand five hundred dollars in cash, with full warranty.

In April, 1820, Babin sold one arpent front of this tract, to Ayraud, for one thousand two hundred dollars, who on the 7th January, 1823, conveyed it to Joseph Hidalgo.

On the 2d June, 1816, the second note of Hernandez, for one thousand five hundred dollars, being unpaid, the heirs of Dublin, commenced suit against Hernandez, and prayed that Winchester, who was in possession of the land, be served with a copy of the petition. On the 18th June, judgment by default was taken against Hernandez; which was entered up for one thousand five hundred dollars, and made final, without any answer being filed, on the 17th September following. The minutes of the court, under this judgment, were signed by the district judge on the same day. This was the only signing of the judgment.

On the 6th of December, 1824, Dublin's heirs, obtained an order of seizure and sale on this judgment, against Babin and Hidalgo, then in possession of the land. On the 17th January, 1825, when it was about being sold by the sheriff, Winchester, as warrantor of the third possessors, obtained an injunction to stay the executory proceeding, and on the 25th June, took a *non-suit*, with the right of producing the same matters in defence, in case he should be called in warranty.

On the 30th July, 1825, Babin and Hidalgo, obtained an injunction, and prayed that Winchester and Ayraud, their

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vendors, he called to defend the title to the premises. They appeared and filed their answers. The injunction was dissolved, and an appeal taken. The judgment of the District Court, was confirmed. See 4 *Martin*, N. S. 611.

The premises were seized and sold, according to this judgment.

On the first of February, Ayraud instituted suit against Babin's heirs, in the Probate Court, to recover one thousand two hundred dollars, the price of one arpent front, of the original tract. The heirs of Babin called Winchester in warranty, expressly reserving their right to sue him for the remaining three arpents.

Winchester pleaded prescription; and that Babin should have notified him of the seizure of the premises in the first instance, and legally called him in warranty, as he could then have made a victorious defence, which he stated at length.

On the 7th February, 1828, judgment was rendered in favor of Ayraud, against Babin's heirs and Winchester, which was confirmed by the Supreme Court, the 23d February, 1829. 7 *Martin*, N. S. 471.

On the 27th October, 1830, Babin's heirs brought the present suit, to recover one thousand eight hundred and seventy-five dollars, the price of the remaining three arpents in front, from which they were evicted, claiming one thousand dollars for improvements.

Winchester pleaded a general denial and prescription. He further averred, that he should have been notified of the first seizure, under the mortgage of Dublin's heirs, and called in warranty, when he could have made a victorious defence.

The following admissions were made:—

1. That at the time of the seizure of the land, Babin owned three arpents, and Hidalgo one arpent.
2. That Winchester was appointed judge, in the early part of 1818.

The witnesses called, proved the improvements made on the land, were worth about one thousand dollars. One of the

witnesses proved, that Winchester told Babin, previous to the sale by the sheriff, in 1826, that if he was evicted, he might make himself easy about it, that he should not lose any thing. This testimony was corroborated by another witness.

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Judgment was rendered in the District Court, by the parish judge against the defendant, and he appealed.

A. & J. Seghers, for the plaintiffs, contended :

1. That the defendant was bound by his promises made to them and proved, in consequence of which this suit was delayed from 1827, until 1830 ; and the plaintiffs at the same time, expressly reserved the right of suing the defendant. This alone would prevent prescription.

2. The warrantor, although not called in warranty in time by his vendee, still is bound to make good the warranty, if he does not show he had sufficient grounds to defeat the action of eviction. *Civil Code*, 357, art. 64. 7 *Martin*, 412, 10 *ibid*, 399.

3. The defendant was bound to explain, in his answer, the means of his defence, but which he entirely omitted, averring he would show them on the trial. This course showed his intention to take the plaintiffs by surprise, which ought not to be tolerated. Not being disclosed in the original answer, they cannot be heard here.

4. But the plaintiffs will answer the objections made in the defence, to the original mortgage of Dublin's heirs, and their judgment. First, the judgment is good, because the citation and service of it was legally made on the defendant, Hernandez, who is not shown to be a Frenchman, requiring the service in French language. 11 *Martin*, 301.

5. The judgment is final, the court being in session three days after it was rendered. The demand was liquidated by a note, so that the judgment only wanted signing, after three days, which was done. 2 *Mar. Dig.* 152. 4 *Martin*, 665.

6. The *procès verbal* of the sale and adjudication of the property of Dublin's estate, to Hernandez, in 1813, was a complete act of sale, a judicial sale, in which a mortgage was retained. 5 *Martin*, 372, 382-3.

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7. The original judgment against the debtor, cannot be attacked except on the grounds of *absolute nullity*, fraud or collusion. It is *prima facie* evidence, and sufficient to support the demand against the third possessor. 8 *Mar. N. S.* 403.

8. In an action against a third possessor of mortgaged property, the creditor is not obliged to produce the evidence on which he obtained judgment against the principal debtor. 1 *Martin, N. S.* 1.

9. There is no law requiring a judgment to be signed on the back of the petition, rather than on the minutes of the court; and where judgment by default, on a liquidated demand is taken, it becomes final by the lapse of three judicial days. 4 *Martin*, 665.

10. The *procès verbal* of a sale, by a parish judge, acting as auctioneer, is a sufficient registry of the sale and mortgage retained in and resulting therefrom, when deposited in his office. He acts in this instance in the capacity of judge, auctioneer and notary. 6 *Martin, N. S.* 121. 2 *La. Rep.* 577.

11. Damages were claimed on the warranty and clearly proved, so that the plaintiffs are clearly entitled to recover them. *La. Code, art.* 2482.

12. The defendant cannot avail himself of prescription. He purchased the evicted premises in March, 1816, was called in warranty, and appeared in 1825, *less* than ten years. The day of the seizure was the 20th December, 1824. *Civil Code, art.* 81, *page* 473.

13. The action of warranty now instituted, is not prescribed. The right to this action only dates back to 1826, the time when the heirs of Babin were evicted, and not from the time of the sale by the defendant to them, in 1816. Again under the old Civil Code, actions of warranty, with many others, were only prescribed by thirty years. *Civil Code, art.* 65, *page* 487.

Roselius, for the defendant.

1. This is an action of warranty. The defendant was not called to defend the hypothecary action by which his vendee was evicted. If he can show that he could have defeated

that action, had he been called, he must succeed against the plaintiff in the present case. *Civil Code, page 356, art. 64.* EASTERN DIST.
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2. The defendant could have successfully resisted the hypothecary action: *first*, because the act of sale from Doublin's heirs to Hernandez, on which the order of seizure and sale was obtained, contains no mortgage; *second*, because the note sued on is not identified with the act of sale, nor was, or is it now shown that it was given for the property sold to Hernandez; *third*, there is no final judgment against Hernandez, the principal debtor. The judgment by default in the record is not signed. *Civil Code, page 460 art. 43*: *fourth*, it is null and void, both as to form and substance; it does not appear to be a judgment by default confirmed; it contains no reasons, and it does not appear to be rendered in term time; *fifth*, prescription could have been successfully opposed, as more than ten years had elapsed from the sale to Hernandez, in 1813, until the institution of the hypothecary action in 1824. 2 *Martin's Dig.* 194, 304. *Civil Code, page 472, art. 81.*

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3. The defendant is protected by prescription in this case, as more than ten years elapsed from the sale to Babin, until the institution of this suit, in 1830. *Paillet, page 851, note to art. 2252 of Code Nap. Merlin, Question du Droit, verbo Prescription, sec. 14.*

3. The damages claimed for improvements are not proved. The defendant sold the premises to Babin, for two thousand five hundred dollars, and seven years afterwards, they were sold by the sheriff on a year's credit, with all the pretended improvements for the same sum.

4. The defendant contends, that if he had been called in warranty when the premises were seized, he could have showed the mortgage, under which Doublin's heirs proceeded, was null and void. The *procès verbal* of the sale of Doublin's estate, in which this mortgage is alleged to be retained, cannot have the effect, and be evidence of a conventional mortgage. A conventional mortgage can only exist by an authentic act, or act under private signature, &c., and there is no other

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conventional mortgage except that which is expressly granted in writing made between the parties. *C. Code, art. 5, page 452.*

5. The judgment which Doublin's heirs obtained against their debtor, before proceeding on the mortgage against the third possessor, was null; being given without reasons, and not signed by the judge. This was requisite under the former system, as well as now. As the law now stands, there cannot be a doubt, that judgment by default must not only be signed, but must also contain the reasons on which it was rendered. *Code of Practice, art. 315.*

6. The warrantor cannot be required to reimburse the purchaser the value of his improvements, when he is not called in warranty. It is clear, that if a proper defence had been made to the hypothecary action, the improvements would have been allowed out of the proceeds of the sale of the evicted premises. If Babin's heirs had chose to abandon the property without seizure, they would then have been entitled to demand of the person evicting them their improvements. *6 La. Reports, 739.*

7. The plaintiffs have omitted to credit themselves for one thousand dollars, being the difference between the mortgaged debt and the price the property sold for. The debt was one thousand five hundred dollars, and price two thousand five hundred dollars. If the defendant is not entitled to a credit for this difference, he is certainly entitled to a credit for a part of it.

8. The defendant having shown the insufficiency of the judgment and mortgage in the hypothecary action, by which the plaintiffs were evicted, and which he could have shown, had he been properly called in warranty in that case, must now be forever discharged.

Mathews, J., delivered the opinion of the court.

This suit was instituted in the court below, by the plaintiffs, as heirs of Charles Babin, against the defendant, the seller and warrantor of a certain tract of land, described in the petition, to their ancestor. The object of the suit, is to recover from the warrantor damages, on account of eviction,

from the property which was sold by him, in consequence of an hypothecary action, prosecuted against the vendor, based on a special mortgage, which had been retained in a sale made at auction, by the judge of the parish of Ascension, &c., at the instance of the heirs of a certain Nicholas Doublin, of whose succession this land made a part.

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The sale made by the defendant in the present action, contains a clause of general warranty, and it is not pretended that he is not bound to make good the loss and damages suffered by the plaintiffs, in consequence of the alleged eviction, unless it be shown that they suffered themselves to be evicted without calling the vendor in warranty, and that he could have successfully resisted the claim of the plaintiffs, in the hypothecary action, by just and legal means of defence, subject to his power and control. In truth, these are the grounds of defence laid in his answer. Judgment was, however, rendered in the court below against him, from which he appealed.

Admitting the fact to be true, that the defendant in the present suit was not regularly called to warrant the title by him conveyed to the ancestor of the plaintiffs, in the hypothecary action, by which they were evicted, we are now compelled to consider the force and effect of the means of defence assumed, as if they had been pleaded in that action, *Civil Code*, page 356, art. 64. These are as specified and detailed by the counsel for the appellant, as follows: 1st. The act of sale from Doublin's heirs, on which the order of seizure and sale was granted, contains no mortgage. 2d. The note sued on, was not identified with the act of sale, &c. 3d. There is no final judgment against the principal debtor, &c. 4th. That offered in evidence in the present case, is without signature, without confirmation (being a judgment by default), and without reasons, therefore, utterly null and void. 5th. Prescription could have been successfully pleaded, &c.

The validity of these assumed grounds of defence must be tested by the law and facts of the case.

Let us examine them in the order placed by the appellant:

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The *procès verbal* of a sale, in which a mortgage is retained, made by the parish judge acting as auctioneer, and duly recorded in the parish judge's office, is full evidence of the mortgage, which is binding on third possessors of the mortgaged property.

The identification of the note sued on with a mortgage taken to secure its payment, may be shown by circumstantial and parole evidence, without the *paraph ne varietur*.

According to the rules of practice in force in 1816, which was before the adoption of the Code of Practice, a judgment by default became final, *ipso facto*, by the lapse of three days; and reasons are not necessary to the validity of such a judgment.

1. The evidence of the mortgage reserved by the heirs of Doublin, in the sale made by them at auction, appears by the *procès verbal* of the auctioneer, who exercised this function *ex officio*, as being parish judge, and is exhibited in this suit, purporting to be a copy from the records in his office as judge; appearing in this manner, it is evidence equally good, of the mortgage retained as of the sale, and if it transferred the property to the vendee (which is not denied), the transfer was made subject to the terms created by the hypothecation, and all being recorded in the office of the judge, the mortgage is binding on third possessors.

2. As to the identification of the note sued on, with the mortgage, admitting this to be absolutely necessary in all actions on mortgages, it is not required that this circumstance, which is merely accidental to the contract, should be made appear by the usual *paraph, ne varietur*. In the present case, a comparison of the date of the note with the sale, and the circumstance appearing that it was executed precisely in pursuance of the terms and conditions of the sale, both as to persons and time of payment, create a violent presumption in favor of its identity with the mortgage, which must stand until the contrary be proven, which has not been done in the present instance.

In relation to the third and fourth grounds of defence (for we will consider them together) it is true, that under the old Code, which governed when the proceedings took place, in the hypothecary action, to which the present contest refers, a creditor was bound, before seizing mortgaged property in the hands of a third possessor, to obtain a judgment against his debtor. And if it be true, as alleged, that no judgment was obtained in the instance now before the court, against the original debtor, the action of mortgage, properly so called, against the third possessor, might have been successfully opposed on this ground. But a judgment was obtained, and the question to be solved relates to its validity.

It is a judgment by default, and under the rules of practice, which were in force at the time it was entered, it became final, *ipso facto*, by the lapse of three days. We have, heretofore,

decided, that reasons are not necessary to the validity of such a judgment. 4 *Martin*, 665. 7 *Ibid.* 440.

The question now occurs, whether a judgment, which becomes final by lapse of time, ought to be considered as available in favor of a mortgage creditor, in a pursuit for payment of his debt, against a third possessor, when such judgment has not been signed by the judge, in whose court it may have been entered by default. It has been decided in several cases, that judgments rendered and pronounced by the tribunals of the state, are not complete, in all respects, until they are actually signed by the judges, who may have pronounced them. Until they are sanctioned by the signature of the judge, a new trial may be rightfully claimed in the court of the first instance, and an appeal taken to the Supreme Court, within the delays limited, counting from the day of actual signature. 3 *Martin*, 389, and 5 *Ibid.* N. S. 105. *Ibid.* 320. The judgments in these cases, it is believed, were pronounced by the judges, who presided at the hearings of the causes and after *contestationes litium*. We are not aware that subsequent legislation has introduced any radical change in the principles established by the act of the legislative council, of the late territorial government of this country, regulating the practice of the superior court of the territory of Orleans, touching judgments taken by default, and requiring the signature of the judge who renders a judgment; at least no change which can operate on the present question. By the fourth section of that act, it is provided, that "if a defendant shall not appear on the day given in the citation, and file his answer, &c., then the petitioner or his counsel, may order judgment to be entered up against such defendant, and if they shall hold session three days after taking such judgment, and no motion is made to set the same aside, upon showing good cause, and to file an answer, or if such motion be made and overruled, then the said judgment shall be final, &c." In all this proceeding, no direct agency of the court is required, and the judgment becomes final by the operation of the law, and it would follow as a corollary, that such a judgment does not require the signature of the judge, in order to

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A judgment by default, which becomes final by operation of law, does not require the signature of the judge to render it perfect and final.

EASTERN DIST. render it perfect and final. But the 13th section of the same
December, 1834. act requires, "that all judgments rendered by said court,

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shall be pronounced in open court, be entered on the minutes of the court by the clerk, and shall, three days thereafter, if not set aside by the court, on motion for a new trial, be signed by the presiding judge of the court." This section, by its terms, most clearly relates to judgments, *rendered and pronounced by the court* after trial, and can only, on a forced construction, be made applicable to judgments by default, which become complete and final, by mere operation of law. According to this interpretation, the signature of the judge, to a judgment of the latter kind, is no more requisite to its validity, than that reasons should be adduced in support of it, and it has already been decided by this court, that reasons need not be assigned in a judgment which becomes final by lapse of time and operation of law, on one taken by default.

In an action of warranty, prescription only runs from the date of eviction. If the action is commenced within ten years, it is in time to prevent prescription.

The action of mortgage is not barred by prescription when commenced within ten years from the time when the debt became due and payable.

Thus we are brought to the plea of prescription. It is clear, that it is not available as a defence to the present action, as introduced in the points of the appellee. The suit in warranty was commenced in 1830, and the eviction complained of did not take place until 1826. Neither could it have been effectually opposed to the mortgage creditors, in their action of mortgage; for their right to sue did not accrue until 1815, and they commenced the hypothecary action, properly so called, in 1824; so that only nine years had elapsed between the time when they had a right to commence it and the time when they did commence that proceeding.

The third possessor, who is evicted, is entitled to recover of his vendor and warrantor the value of his improvements put on the evicted premises at the period of eviction.

The last objection to the justice and legality of the judgment rendered in the court below, has reference to the damages allowed to the plaintiffs. It is said that they are not authorised, either by the facts or law of the case. As to the matter of fact, it suffices to observe, that there is evidence on record, proving that the third possessor, who was evicted, had made improvements on the premises to the value of one thousand dollars at least, and this amount only is awarded. As to the law on this subject, it appears by the art. 2485 of the *La. Code*, that the seller or warrantor is bound to reim-

burse, or to cause to be reimbursed to the purchaser, by the person who evicts him, all useful improvements made by him on the premises. This article is in accordance with the provisions of the old Civil Code, and conforms to the doctrine taught on this subject, by Pothier, in his treatise on sales. *Contrat de Vente, nos. 132 and sequentes.* In case of eviction, consequent on a mortgage, it is possible, that these rules may not strictly apply. In the present case, however, nothing appears to show any injustice in their application.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In cases submitted to referees, without granting them the power to act as amicable compounders, the court may revise and rectify any errors contained in the award rendered by them.

Where a cause is submitted to referees, with power to act as amicable compounders, their award rendered in pursuance of the submission, and made in relation to the matters actually referred to them, is without amendment, revision or appeal.

The award of amicable compounders, which has no relation to the matters in dispute submitted to them, is absolutely null and void; and when their acts show dishonesty, gross misconduct, want of due regard to well settled principles, or extreme partiality in rendering their award, these will be good grounds for *setting it aside*.

Amicable compounders are not required to determine, according to strictness of law, but are authorised to abate something of this strictness, in favor of natural equity.

The approval and formalities required, in the homologation of an award, are only intended to make it executory, and not for the purpose of an examination on its merits.

EASTERN DIST. The law, providing for submitting causes to amicable compounders, whose
December, 1834. award, if not impeached, is not subject to revision by the courts, is not

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unconstitutional.

This is an action for the rescission of a contract with the defendant, to furnish the plaintiff a steam engine and sugar and corn mill, for six thousand dollars, and for the restitution of the price, with damages.

The plaintiff alleges, he is a sugar planter, and contracted with the defendant, who owned an iron foundry, to furnish and erect for him, a steam engine, sugar and corn mill, on his plantation, for doing which, he conveyed a house and lot to the defendant, at the price of six thousand dollars; and that the defendant bound himself to put up said engine, mills, and all the necessary machinery, in the best workmanlike manner, by the first of August, 1832, in time to take off his sugar crop. He further alleges, the defendant failed to comply with his contract, and did not put up the steam-engine and sugar mill, until the 29th November, when the grinding season was nearly over, and then in such an imperfect manner, and of such bad materials, as rendered them almost unfit for use, and failed entirely to put up the corn-mill, in consequence of which he has sustained damages to the amount of eight thousand dollars. He prays for a rescission of the contract, and sale of the house and lot to the defendant, and for the restitution of the price, (six thousand dollars,) with eight thousand dollars in damages.

The defendant admitted the contract, and pleaded a general denial to all the other allegations; and also averred, that any delay in putting up the engine and mill, was occasioned by the plaintiff, and that it was with his consent the corn-mill was not furnished.

After the cause was at issue, on motion of the counsel for each party, and each naming a suitable person, with a third as umpire, it was ordered by the court, that said persons be appointed referees, arbitrators and *amicable compounders*, and as such, to settle and decide upon the matters in dispute between the parties.

The amicable compounders, or a majority of them, after hearing all the evidence adduced, and the explanations of the parties respectively, made up their award, in which they decided, that the contract be cancelled, and that the plaintiff recover six thousand dollars, the price of the engine and mills, with interest from judicial demand, and five thousand dollars damages and costs; and that the engine and mill remain subject to the order of the defendant.

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The defendant's counsel filed an opposition to the homologation of the award, mainly on the grounds of error and want of precision in stating the accounts, allowing damages when none were proved, of excessive damages, the award being contrary to law and evidence, and that the arbitrators exceeded their powers. He prays leave to appeal from the award, and that it be set aside as being informal, illegal, unjust and oppressive.

The district judge was of opinion, that in a case of a submission to amicable compounders, the award is not open to examination on the merits. *Code of Practice, art. 460.* But an award is open to examination by way of cassation, as where a *specific* charge of misconduct, exceeding of powers, &c., is brought against the amicable compounders.

The award was homologated, and made the judgment of the court. The defendant appealed.

Preston, for the plaintiff.

1. In pursuance of the article 444, of the Code of Practice, both parties agreed that their dispute might be submitted to the decision of judicial arbitrators, to act as amicable compounders.

2. The amicable compounders were duly qualified, and a majority made an award. The District Court could not do otherwise than homologate it, and make the award the judgment of the court, for the law requires that it must be homologated as it stands, to have the effect of a definitive judgment. *Code of Practice, art. 460.*

3. The parties clearly constituted the arbitrators amicable compounders; and nearly all the grounds of opposition to the

EASTERN DIST. award, would require the court to open and revise it, on its merits, which is prohibited by the *Code of Practice*.
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4. The award of ordinary arbitrators, could not be set aside on any of the grounds set up in the opposition. A bill in equity will not lie, to set aside an award of arbitrators on a question of fact, except for corruption, or irregularity of conduct in the arbitrators. 2 *Jacobs and Walker's Reports*, 249, 259. *La. Code*, 3077. 1 *Swan*, 52, 55. 6 *Vesey*, 232, 358. 4 *Brown's Chancery Cases*, 536. 1 *Vesey, jr.* 369. 2 *Ibid.* 15. *Kyd on Awards*, 332.

5. It is impossible to show, that the amicable compounders exceeded their authority or powers. Their award comes within the pleadings, and, no doubt, they made a compromise between rigid right and a hard case, as arbitrators always do. The award should be favored, as this mode of terminating differences, is favored in law and equity, and by general consent of the community.

6. The articles of the Code of Practice, authorising appeals from awards, are inapplicable to this case. They can only apply to arbitrations, made by the parties out of court, from which an appeal may be taken to the District, and from thence to the Supreme Court. *La Code*, art. 3097.

7. The constitution, art. 6, sec. 6, requires the legislature "to pass such laws as may be necessary and proper, to decide differences by arbitrators, to be appointed," &c.

8. If the party was permitted to appeal, and try the case *de novo*, and introduce witnesses and new testimony, the case would not be decided by arbitrators, but by the court.

Carlton and Lockett, for the defendant, contended, that the awards of arbitrators were open to an examination and revision by the courts. An award had been set aside in this court, because it was not written in the French language. This decision gave rise to an act of the legislature, in relation to awards, which permits them to be excepted to, for informalities and defects, and especially when the arbitrators exceed their powers, or are not qualified, &c. 9 *Martin*, 200. 1 *Moreau's Digest*, 453-9-60.

2. The arbitrators must make their report with precision, by stating the accounts, to enable the court to judge of its correctness, and to decide summarily on the merits of the award. *Code of Practice*, 455.

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3. The legislature cannot pass a law, which deprives a party of his right of appeal. That is in effect done in this case, if the court is not permitted to examine the award on its merits, and revise it on appeal. Such a law is unconstitutional.

4. The appellate jurisdiction of this court, applies to the facts as well as the law of a cause, consequently we have a right to be heard on the facts, and the court has the power to examine them, and revise the decision or award which is based on the facts submitted and in evidence.

5. If the amicable compounders had given more damages than the party claims in his petition, they would certainly have exceeded their powers, and the award would be set aside ; and why not the same result take place, if they give damages when none are proved, or more than are proved ?

Mathews, J., delivered the opinion of the court.

In this case, the plaintiff claims restitution of the price, which he had paid to the defendant, (who is an iron founder in the city of New-Orleans,) for a steam-engine, sugar-mill and corn-mill, which were by contract to have been furnished by the latter, constructed in a manner suitable to carry into effect the purposes for which they were intended. The petition contains allegations of unjustifiable delays, in making the engine and sugar-mill ; of defects in their construction, so great as to render them wholly unfit for the uses, in which they were to be employed, and of a total neglect to make the corn-mill, &c., and concludes by praying, that the contract should be rescinded, the price refunded, and that damages should be adjudged to the plaintiff, in reparation of losses sustained by him, arising from an impossibility to take off his crops of sugar, &c.

The answer contains a full denial and allegation that the delays complained of, were owing to the fault or assent of the plaintiff.

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On these pleadings the case was submitted, by consent of parties and under a rule of court, to certain arbitrators, chosen by the parties themselves, each of them choosing one, and pointing out by name an umpire, in the event of disagreement, &c. The powers and authority of arbitrators, known in our jurisprudence, under the denomination of amicable compounders, were by the submission, confined on the persons thus chosen as judges, by the parties litigant. They made, and returned their award into court in due time, which, after cause shown on a rule taken for that purpose against the defendant, was homologated by the court below, and made the judgment thereof, from which he appealed.

This award condemned the defendant to refund the price stipulated and paid for the engine and mills, viz: six thousand dollars, and also assessed damages against him to the amount of five thousand dollars.

The correctness of the decision of the court below, depends mainly on a proper interpretation of certain articles of the Code of Practice, found in the section which treats of experts, auditors of accounts, and judicial arbitrators.

In cases submitted to referees without granting them the power to act as amicable compounders, the court may revise and rectify any errors contained in the award rendered by them.

Where a cause is submitted to referees with power to act as amicable compounders, their award rendered in pursuance of the submission, and made in relation to the matters actually referred to them, is without amendment, revision or appeal.

The grounds of opposition, to the homologation of the award, in the present instance, are most of them, (if not all,) such as are usually opposed to awards rendered under ordinary submissions to arbitrators. In cases, submitted without the grant of power to the referees, to act as amicable compounders, the court may rectify the errors contained in awards, by them rendered. *Code of Practice, art. 459.* : "But if, from the submission entered into by the parties, it appears that they intended to give to the arbitrators power to act as amicable compounders, the court cannot revise the award. It must be homologated as it stands, in order that it may have the effect of a definitive judgment." *Code of Practice, art. 460.*

The submission in the present case, clearly contains a grant of power to the arbitrators, to act as amicable compounders, and consequently deprives the tribunals of the country, of all authority to revise the award rendered in pursuance of it. Whatever has been done, in relation to the

matters actually referred to their decision, if done honestly, must remain without the possibility of revision, and as a necessary consequence, without alteration or amendment. Acts done by such arbitrators, having no just relation to the matters in dispute submitted, would be absolutely void, and gross misconduct on their part, exhibiting a want of due respect, to common and well established rules, in regard to right and wrong, or extreme partiality in their award, would be good causes for setting it aside entirely, if proven to the court, on opposition to its homologation. But nothing of this kind is either alleged or proven, in the present instance. The whole of the grounds assumed, in the numerous points presented by the counsel of the defendant, relate to want of precision in the manner in which the cause was laid before the arbitrators, and errors in their award, arising from a mistaken view of the facts and the law of the case. If parties will submit their disputes to be decided by men, chosen by themselves as judges, under the appellation of amicable compounders, they must abide their judgments, without hopes of having them revised by the courts of justice established by the constitution and laws of the state. Such judges are not required to determine according to the strictness of the law. They are authorised to abate something of this strictness in favor of natural equity. *La. Code, art. 3077.*

This article of the Code, if it stood alone in our jurisprudence, would appear extremely vague and indefinite. What might be considered a strict pursuance of law in the administration of justice, and what a loose adherence to its rules, are questions that would depend ultimately for their solution, on the decisions of courts in the last resort. But it appears to us, that a clue to its interpretation, (not indeed very evident,) is given in the articles of the Code of Practice above cited, wherein it is declared, that the awards of arbitrators, acting as amicable compounders, cannot be revised by the courts. In article 3096, of the Louisiana Code, provisions, similar to those contained in the Code of Practice, are found in relation to the awards of arbitrators indiscriminately, wherein it is declared, that "an award, in order to be put in execution,

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The award of amicable compounders which has no relation to the matters in dispute submitted to them, is absolutely null and void; and when their acts show dishonesty, gross misconduct, want of due regard to well settled principles, or extreme partiality in rendering their award, these will be good grounds for setting it aside.

Amicable compounders are not required to determine according to strictness of law, but are authorised to abate something of this strictness in favor of natural equity.

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The approval and formalities required in the homologation of an award are only intended to make it executory, and not for the purpose of an examination on its merits.

The law providing for submitting causes to amicable compounders whose award, if not impeached, is not subject to revision by the courts, is not unconstitutional.

ought to be approved by the judge; but this formality is only intended to invest the award with a sufficient authority to ensure its execution, and not to submit to the judge the examination of its merits, except in case an appeal is brought before him." This article, so far as it relates to an appeal, as well as the one immediately following, appear to us to be totally inadequate to carry into effect their apparent purposes, without the aid of ulterior legislation. If the appeal spoken of, be intended as one directly to the Supreme Court, no means are given by which the case may be brought up; and if the intention was to give an appeal, in the first instance, to the inferior tribunals, and in that way to bring a cause, involving more than three hundred dollars, before the Supreme Court, the same want of means renders it impossible, as the formalities requisite to effect such a purpose are not pointed out.

In the course of argument, one of the counsellors for the appellant, dwelt much on the unconstitutionality of any act of legislation which would operate in such a manner as to deprive a suitor of the right of appeal, or the right to have his cause revised by the appellate court, established by the constitution, a law which should undertake absolutely to deny the right of appeal, (in any case where the matter in dispute is more than three hundred dollars,) from a final judgment, rendered by a court of inferior jurisdiction, established by law, would be clearly unconstitutional. But many of the provisions of legislative acts, relating to the manner of taking and bringing up appeals, have in their operation the effect of depriving an appellant of the means of having his case revised in the Supreme Court, on its merits; and these laws have never been deemed unconstitutional. Suppose the legislature had provided no means for obtaining and bringing appeals before the appellate court, as established by the constitution, its provisions on this subject, would probably have remained a dead letter, and the supreme tribunal of the state must have continued inoperative. In giving life and activity to this court, the acts passed by the legislature, pointing out the mode in which the judgments of inferior

courts may be revised and affirmed, or revised and annulled, EASTERN DIST. December, 1884. and which in their operation do, sometimes, by the neglect of an appellant, preclude the Supreme Court from examining a cause on its merits, are certainly not contrary to the constitution. The constitutional provision which gives the right of appeal, had reference alone to inferior courts, to be established for general purposes by the legislature; and if parties to a suit will choose their own judges, under the sole authority of law, they must be bound by the decision of such judges, in conformity with the provisions of law.

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According to the best consideration we have been able to give to the case, we are of opinion, that the judgment of the District Court is correct.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BARBARIN VS. DANIELS.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.**

When the original payee is in possession of a note, on which his name is endorsed in blank, no proof of re-transfer is necessary to enable the holder to recover.

A mortgage which, without reciting the interest, refers to and secures the payment of a note, is evidence of the principal obligation, and covers all the stipulated interest therein.

Where a note stipulated for ten per cent. per annum interest, and was made payable eighty-five days after date: Held, that the interest run from the date of the note, until payment, without any demand at its maturity.

The Supreme Court, in its discretion, will refuse damages, as for a frivolous appeal, even when the grounds of defence are untenable, and when the principles upon which they rest, have been settled by previous adjudication:

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DANIELA.

The plaintiff obtained an order of seizure and sale, on the following note, secured by a mortgage on a house and lot, in the city of New-Orleans.

"\$2,700."

"New-Orleans, April, 16, 1834."

"Eighty-five days after date, I promise to pay to the order of Morris Jacobs, two thousand seven hundred dollars with interest, at the rate of ten per cent. ; value received."

"Aaron Daniela."

Endorsed, "Morris Jacobs, J. Barbarin."

Paraphed, "*Ne varietur*, 23d April, 1834."

"Carlisle Pollock, N. P."

When the note became due, it was deposited in bank for collection, and protested at the instance of the cashier, as holder, and sued on by the plaintiff, without any re-transfer.

The mortgage simply recites the note sued on, by its date and amount, without any mention of the interest stipulated on its face. The defendant took an appeal from the order of seizure and sale.

D. Seghers, for the appellant and defendant.

1. The plaintiff sues on a note of two thousand seven hundred dollars, which he alleges, *necessarily imports confession of judgment*. Now it appears from the note, that it was transferred by his signature endorsed thereon; and from the instrument of protest, it appears that the bank of Louisiana is the holder of the note, and consequently the only party entitled to sue on the same.

2. The judge *a quo*, therefore, erred in granting the order of seizure and sale, at the suit of the plaintiff, Joseph Barbarin, while from his own showing, it appears that he had parted with the note.

3. The order of seizure and sale is granted, "*for the payment and satisfaction of the above sum of two thousand seven hundred dollars, together with the maximum of legal interest and costs*," agreeably to the conclusions of the petition. Now it is on the notarial act, not on the note, that the order of seizure and sale can issue. Besides, even if the note should be considered as sufficient evidence of such a stipulation of interest,

this stipulation cannot be extended beyond its own limitation: that is to say, that by the wording of this contract or promise, the time during which the interest of ten per cent. per annum is to be paid, is confined to the eighty-five days which the note had to run.

4. The judge *a quo*, therefore, erred: 1st. In granting the order of seizure and sale for the payment of conventional interest, not secured by the mortgage recited in the notarial acts on which the said order is founded, and not even mentioned in those acts; and 2d. In not restraining the rate of interest at ten per cent. per annum to the space of time during which it was promised to be paid.

Keene, contra.

Bullard, J., delivered the opinion of the court.

The appellant assigns for errors apparent on the face of the record, 1st. That it appears by the note itself that it had been transferred by the endorsement of the appellee, and that the Bank of Louisiana was the holder at the time of the protest; and, 2d. In granting the order of seizure for the payment of conventional interest, not secured by the mortgage recited in the notarial acts on which said order is founded; or, at all events, in not restraining the interest to the space of time during which it was promised to be paid.

I. The endorsement is in blank, and the original payee is in possession of the note. It is true, the protest states, that the cashier of the Bank of Louisiana was at that time holder for the bank. But this court has decided, in several cases, that when the payee retains possession, and the endorsement of his own name on the note is in blank, no proof of re-transfer is necessary to enable the holder to recover. *7 Martin, N. S. 255. 2 La. Reports, 193.*

II. The note referred to in the act of mortgage, and identified with it by the certificate of the notary, stipulates for an interest at the rate of ten per cent. per annum, and is made payable eighty-five days after date. The mortgage, without reciting the interest, refers to and secures the payment of the

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When the original payee is in possession of a note on which his name is endorsed in blank, no proof of re-transfer is necessary to enable the holder to recover.

A mortgage which, without reciting the interest, refers to and secures the payment of a note, is evidence of the principal obligation, and covers all the stipulated interest therein.

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Where a note stipulated for ten per cent. per annum interest, and was made payable eighty-five days after date: *Held*, that the interest run from the date of the note until payment, without any demand at its maturity.

The Supreme Court, in its discretion, will refuse damages as for a frivolous appeal, even when the grounds of defence are untenable, and when the principles upon which they rest, have been settled by previous adjudications.

note, which is evidence of the principal obligation. The mortgage, therefore, covers the stipulated interest. But it is contended, that the interest is not to run after the maturity of the note, and that the judge erred in issuing the order of seizure for interest, until final payment. We think the judge did not err. Article 1931 of the Louisiana Code, provides, that "in contracts stipulating a conventional interest, it is due, without any demand, from the time stipulated for its commencement until the principal is paid."

The appellee in his answer, prays for damages of ten per cent. as for a frivolous appeal. The grounds upon which the appellant seeks relief in this court are, in our opinion, untenable; that which relates to the endorsement having been adjudicated upon by this court, in several cases, and, as relates to interest until final payment, the principle is settled in the most unequivocal manner by the article of the Code above referred to. But we do not consider this one of the cases which require us to inflict a severe penalty on the appellant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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PETIT ET ALS.
VS.
DRANE.

PETIT ET ALS. VS. DRANE.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The service of citation of appeal, on the attorney at law of the appellees, when it is admitted the latter are residents of the parish where suit is brought, is illegal, and the appeal will be dismissed.

This suit is brought by the plaintiffs to recover the sum of nine hundred and four dollars and forty cents, for work and labor done, and materials furnished, at the instance and request of the defendant, according to an account annexed.

The defendant avers, that he employed the plaintiffs, while acting in his capacity of assistant quarter-master and agent of the United States army, and with the full knowledge of the plaintiffs that he did so act; that the United States alone are liable for any just amount which may appear to be due. He excepts to the plaintiffs' right to sue him in his individual capacity, and that the action cannot be maintained. In answering to the merits, he denies that the plaintiffs done the work, or that it was worth the price charged; and sets up payments, made in his official capacity, to the persons who done the work, as offsets to the demand against him.

There was judgment rendered in favor of the plaintiffs, and the defendant appealed.

The appeal was made returnable to the Supreme Court, the first Monday of November, 1834. The sheriff returned, that he had served the petition and citation of appeal on the appellees, by handing the same to their attorney at law.

Benjamin, for the plaintiffs and appellees, took a rule on the appellant, to show cause why the appeal should not be dismissed, for illegal service of the petition and citation of appeal.

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2. He showed by his affidavit, that the appellees were residents of the parish where the suit was instituted, and had a known domicile therein, which he would have pointed out to the officer, had application been made to him.

Lockett, contra, contended, that the plaintiffs had no known place of residence, at which they could be found, or domicile, at which to leave the citation. In such cases, and when it is not known that they reside out of the state, the party is without a remedy. The law makes no provision for it. The party should, therefore, have the right to make a new service, when the domicile or residence of the appellees is found.

2. It is now admitted, in this case, that the service of citation of appeal is not good. We ask the court for time to make it good, by a new citation and service. When the errors and omissions in making service are not the fault of the appellant, time will be given, if applied for, before or at the time of hearing the cause. *Code of Practice, article 898.*

Bullard, J., delivered the opinion of the court.

The service of citation of appeal, on the attorney at law of the appellees, when it is admitted the latter are residents of the parish where suit is brought, is illegal and the appeal will be dismissed.

The appellee urges the dismissal of the appeal, in this case, on the ground that there has been no due service of citation of appeal. The service was made on the attorney at law, although it is admitted that the appellees are residents of New-Orleans. Article 582 of the Code of Practice, requires the sheriff to serve the petition and citation on the appellee, if he reside within the state, or his advocate, if he do not, either personally, or by leaving them at their place of usual domicile.

It is, therefore, ordered, that the appeal be dismissed at the costs of the appellant.

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January, 1835.

LOZE vs. DIMITRY ET ALS.

LOZE
vs.
DIMITRY ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The seizure under writ of *secre facias*, of a schooner or other moveable property of the husband, takes it from his possession, so that a subsequent judgment against him by his wife, with her legal mortgage, cannot affect it.

Among the different privileges and mortgages, which may exist on ships and other vessels, none is given to the wife.

Ships and vessels are subject to hypothecation, though not like immoveables and slaves; but only according to the laws and usages of commerce.

The legal mortgage of the wife does not attach to ships and vessels, as the hypothecation is not effected according to the laws and usages of commerce.

This case grew out of a conflict of claims between the plaintiff, who had seized two schooners under a judgment and execution against the defendant Dimitry, and his wife, who claims a privilege on said vessels.

The plaintiff obtained judgment against Dimitry, and in virtue thereof seized two schooners belonging to the defendant, on the 30th January, 1834. The defendant's wife obtained judgment of separation of property, on the 17th February following, for a large amount of dotal and paraphernal property, with legal mortgage on her husband's estate. She intervened in the seizure, and opposed it on the ground that she had a higher privilege and mortgage, and prayed that the property be sold to satisfy her claim.

The district judge was of opinion, that when the wife obtains a judgment for the restitution of her paraphernal and dotal property, her mortgage being a latent one, attaches to all the property of the husband; that the schooners, though under seizure, were still his property until sold, and were liable to her mortgage. Judgment was rendered for the intervenor. The plaintiff appealed.

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vs.
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Grailhe, for the plaintiff, insisted that, by the seizure, the seizing creditor obtained a privilege on the vessels, which could not be opposed by the claim of the intervenor, whose judgment was rendered afterwards. *Code of Prac. art. 722.*

Canon, for the intervenor and appellee, contended that the wife's privilege or mortgage, was of a higher class than that of the seizing creditor, and her mortgage extended to all the husband's property. *Code of Practice, 396.*

Martin, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment, which decrees to the wife of the defendant (she being an intervening party), the proceeds of two schooners, seized by the plaintiff, under an execution issued in pursuance of a judgment obtained against said defendant, on the 30th January, 1834, while the judgment by which the intervening party obtained a separation of property and liquidation of her claim, was not rendered until the 17th of February following, and that too, after the seizure of the schooner, under his (the plaintiff's) writ of *feri facias*, which put an end to the defendant's possession of these vessels.

The counsel for the appellant contends, that the seizure under the Code of Practice, article 720, vested in the plaintiff a privilege on the property seized, which entitled him to a preference over all other creditors.

On behalf of the intervening party, it is urged that the privilege claimed, under the article of the Code of Practice cited, is only a privilege over other common creditors, which does not stand in the way of higher privileges, when asserted in due time. We are referred to the Code of Practice, article 396, where the mode in which those who have a higher privilege than the seizing creditor may assert it; that the wife has a tacit mortgage on all her husband's property, susceptible of being mortgaged, amongst which ships and vessels are expressly classed. *La. Code, 3256, No. 4.*

It appears to us, that the schooners having been levied on, under the writ of *feri facias*, were taken out of the possession of the defendant; and his wife, therefore, could not acquire a privilege on them, by a judgment posterior to the seizure of moveable property. *La. Code, art. 3182.*

The *Louisiana Code, article 2304, et seq.* recites the different privileges which may exist on ships and vessels; among those, none is given to the wife.

Ships and vessels are indeed susceptible of being mortgaged, but not like immoveable property. The mortgage of ships and vessels (or, to speak more correctly, in the language of the Louisiana Code, art. 3272), the *hypothecation* of ships and vessels does not take place, like that of immoveable property and slaves, but according to the laws and usages of commerce. They are not mentioned in that part of the Louisiana Code which treats of legal and judicial mortgages, and not classed with immovable property and slaves, as being susceptible of mortgage.

From this view of the case, the District Court erred, in sustaining the claim of the intervening party. In our opinion, she had no privilege, because the schooners, by the seizure under the plaintiff's execution, were taken out of the possession of the husband, the wife's debtor, before the dissolution of the marriage partnership. She had no mortgage thereon, as the hypothecation or mortgage on them as ships and vessels had not been made or executed according to the laws and usages of commerce.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that the claim of the wife and intervening party be dismissed, with costs in both courts.

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LOZE

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The seizure under a writ of *feri facias* of a schooner or other moveable property of the husband, takes it from his possession; so that a subsequent judgment against him by his wife, with her legal mortgage cannot affect it.

Among the different privileges and mortgages which may exist on ships and other vessels, none is given to the wife.

Ships and vessels are subject to hypothecation, though not like immoveables and slaves; but only according to the laws and usages of commerce.

The legal mortgage of the wife does not attach to ships and vessels, as the hypothecation is not effected according to the laws and usages of commerce.

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MALCOLM ET AL.
VS.
SCH. HENRIETTA
ET ALS.

MALCOLM & WOOD VS. SCHOONER HENRIETTA ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The provision in the Louisiana Code, that "ships and other vessels" are susceptible of being mortgaged, is restricted to hypothecations, made according to the laws and usages of commerce. In whatever cases those usages and laws would recognise the validity of an hypothecation of a vessel, our Code also recognises it, and in none other.

So where a conventional mortgage on a schooner, executed by the owner, in favor of a creditor, to secure the payment of a debt, and duly recorded in the mortgage office, was sought to be enforced: *Held*, that such a mortgage has no effect; and that ships are not subject to the same incumbrances which attach to immoveables, as lands and slaves, situated within the constant operation of the laws of the state.

This is an action against the owner and schooner Henrietta, for supplies furnished, amounting to six hundred and ninety-nine dollars and fifty cents, in which the plaintiffs claim judgment with a privilege on said vessel, and pray that she may be provisionally seized, and held subject to their demand.

Holston intervened, and set up a demand against the said schooner and her owner, for the sum of five hundred and forty-two dollars, secured by a special mortgage, duly recorded in the mortgage office, and claims to be paid in preference of all other creditors. He denies that the plaintiffs have any privilege, and that if they ever had one, it is extinguished by the departure of the vessel since their claim attached.

Gedney also intervened, and claimed four hundred and twenty dollars and seventy-seven cents, for work done and materials furnished, as a ship carpenter on said schooner, and claimed to be paid, as a privileged creditor, in preference of all others.

Several sailors put in privileged claims.

The district judge fixed a day to hear and try the several claims against the schooner and her owner, and to class them according to their privileges; and after hearing the parties and examining their several pretensions, proceeded to give judgment in the following manner: "*Miller and Living*, who are sailors, are entitled to be paid their wages for the last voyage, in preference to all other creditors." "*Holston* not having established his claim to be of that character, for which a mortgage can be given on a vessel, his intervention must be dismissed." "The only remaining claim, is that of *Malcolm and Wood*, which is privileged against the owner, in its full extent. As to the claim of *Gedney*, the privilege is extinguished, the vessel having made several voyages since the debt accrued."

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ET ALS

Holston and Gedney applied for a new trial, which was overruled. *Holston*, the mortgage creditor, appealed.

Carter, for the plaintiffs, made the following points:

1. The provisions of the La. Code, which admit that ships and other vessels may be mortgaged, when interpreted in connexion with the articles of the Civil Code and the maritime law, show that the mortgage must have grown out of the necessities of the trade of those vessels, or created for their advantage. *La. Code, art. 3256, No. 4. Civil Code, art. 38, p. 458.*

2. The provisions of both codes, when all taken together, show conclusively, that ships and all trading vessels, can only be mortgaged or hypothecated according to and are governed by the principles of the maritime law. *La. Code, art. 3272, 3256. No. 4. Civil Code, art. 38, p. 458.*

3. If there be a doubt as to the law, or if the articles of the codes are not positive, and establish the construction for which we contend, the interpretation given by the District Court should at any rate prevail, and that vessels or ships ought not in any case be susceptible of mortgage, unless for the use and to relieve the necessities of the vessel.

4. The account of the plaintiffs, is for supplies in money and articles furnished the vessel, which give a privilege on

EASTERN DIST. her of the highest rank. The bare mortgage claim of
January, 1835. Holston, the appellant, cannot in any respect be admitted
 in competition with our claim.

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ET AL.

5. Vessels are subject to peculiar privileges known to all the world; but where an individual takes a mere mortgage for a sum lent, or to secure a debt due by the owner, it cannot affect the vessel, and the lender or creditor must abide the consequences, which the codes and the maritime law inflict in such cases.

Roselius, for the appellant.

1. Ships and other vessels, are made susceptible of conventional mortgage, by the positive enactments of our code. *La. Code*, 3256, No. 4.

2. The plaintiffs have no privilege on the vessel. If they ever had any, it has been lost by permitting the vessel to make a voyage. The privilege only attaches for supplies furnished, previous to the departure of the vessel.

Bullard, J., delivered the opinion of the court.

In this case the court is called on, for the first time, to consider and give an interpretation to those articles of the Louisiana Code, which relate to the mortgage of ships or other vessels. The question arises in the distribution of the proceeds of a schooner, sold in pursuance of a provisional seizure, sued out by Malcolm & Wood, to reimburse themselves certain supplies furnished by them, and for which they claim a privilege. Several persons intervened, and among others L. Holston, who exhibits a special conventional mortgage on the schooner, executed by the owner before a notary, and recorded in the office of the recorder of mortgages, in this city.

Article 3256 of the code, enumerates among the objects susceptible of mortgage, "ships and other vessels." When treating afterwards of conventional mortgages, it declares (article 3272) that "hypothecations of ships and other vessels, are made according to the laws and usages of commerce." The opinion that the legislature intended to

restrict the mortgage of ships, to the cases in which such hypothecation would be considered as valid, by the usages of commerce or the commercial law, is much strengthened by the fact, that by the same code, neither a judicial nor a legal mortgage attaches to that species of property. The hypothecary creditor can only exercise his right on immoveables and slaves. We have recently had occasion to examine the subject, in relation to the legal mortgage of the wife, to secure the restitution of her dower, and came to that conclusion. See *the case of Loze vs. Dimitry et al.*, ante, 485.

The declaration that ships are susceptible of mortgage, is among the amendments of the old code, which contained no such enunciation in distinct terms. That code, after enumerating the objects susceptible of mortgage, and declaring that moveables shall no longer be subject to be mortgaged, either generally or specially, declares that "the present disposition, in no way alters or effects the dispositions of the maritime or trade laws, respecting ships and sea vessels." The provision in the Louisiana Code, that "ships and other vessels" are susceptible of being mortgaged, is restricted to hypothecations made according to the laws and usages of commerce. In whatever cases those usages and laws would recognise the validity of an hypothecation of a vessel, our Code also recognises it, and in none other.

Although there is a difference in the phraseology of the old and new codes, there is in our opinion no difference substantially, in their provisions on this subject. They both recognise, as a general principle of our municipal law, that moveables are not susceptible of mortgage, but at the same time, admit an exception as to ships and vessels, under the maritime law, which as the compliment of the law of nations, founded on the general acquiescence of commercial states, regulates and controls the great interests of navigation and commerce, except so far as it is repugnant to a positive law of the state. The old code contains only a reference to the usages of trade, in relation to the hypothecation of vessels; the amendment simply declares, that ships and other vessels are susceptible of mortgage, and then qualifies the principle by declaring, that such hypothecations are made according to the laws and usages of commerce; the one leaves the principle, that ships are in some cases susceptible of mortgage, to be deduced as an inference from its general provisions on that subject matter; the other announces that susceptibility in positive terms, according to the forms, and in

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the cases established by the commercial law. We consider both as declaratory laws, recognising the existence of the commercial law, as a system distinct from, and co-existing with the municipal code, and giving effect to hypothecations of ships, made according to such usages, notwithstanding the general maxim, that moveables are not susceptible of mortgage.

Although it is generally unsafe to rely on arguments *ab in convenienti*, in the interpretation of laws, yet the view we have taken of this part of the code, is confirmed by a consideration of the consequences, which might result from a different conclusion. If it were settled as a principle, that a mortgage in the ordinary form, and to secure the payment of a debt, no matter what might be its origin or consideration, would follow the ship into whose ever hands it might come, and adhere to it amidst all the changes and hazards incident to navigation, how could the master of a vessel, belonging to the port of New-Orleans, procure funds in a foreign port, on the credit of her bottom ; funds, perhaps absolutely necessary for repairs or other exigencies of the vessel ? Such a system would not only be productive of injurious impediments to commerce, but might lead to enormous frauds. The purchaser

So where a conventional mortgage on a schooner, executed by the owner, in favor of a creditor to secure the payment of a debt, and duly recorded in the mortgage office, was sought to be enforced : *Held*, that such a mortgage has no effect ; and that ships are not subject to the same incumbrances which attach to immoveables, as lands and slaves, situated within the constant operation of the laws of the state.

of a vessel in any foreign port or at sea, looks only to the register or other ship-papers, to ascertain the title and the incumbrances. The principle now contended for, by the appellant, would compel him to resort to the office of the register of mortgages ; and where is such a mortgage to be registered ? We cannot suppose, that the legislature intended to subject those great instruments of commerce, "which are built to plough the seas, and not to rot by the walls," to the same incumbrances which attach to lands, situated within the constant operation of its laws, or to slaves, who, although capable of being removed, are generally destined to its cultivation. The emperor Antoninus, when interrogated concerning a question of navigation, repeated the declaration of Augustus, "I am the master of the earth, but the Rhodian law is mistress of the sea." He recognised, as our legislature has, the existence of a commercial code, upheld by general

consent, growing out of the mutual wants of nations, and founded on principles of natural equity, which are of universal obligation. In whatever cases those usages and laws would recognise the validity of an hypothecation of a vessel, our code also recognises it, and in our opinion in none other.

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TOBY
VS.
MAURIAN.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

TOBY VS. MAURIAN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

No recovery can be had of the endorser, until demand of payment has been made on the drawer or maker, or on his heirs or legal representatives if he be dead, unless the impossibility of making such a demand is shown, So where the maker of a note died on the last day of grace, the notary, on calling at his domicile being informed of his death, protested the note for non-payment, and notified the endorser thereof: *Held*, that there was no demand of payment sufficient to bind the endorser.

This is an action against the endorser of a promissory note, signed by A. Peychaud, for one thousand dollars, payable to the order of the defendant, and by him endorsed to the plaintiff. The latter alleges, that payment was duly demanded of the drawer, and the note protested for non-payment, of which the defendant as endorser had due notice. He prays judgment against said defendant for the amount of the note, interest and costs.

The defendant pleaded the general issue; admitted his signature, and averred that he was not liable as endorser, because the note had not been legally protested, nor had he been legally notified of its dishonor.

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The protest states, "that the notary went to the house formerly occupied by the drawer in order to demand payment, and was informed by a servant whom he found there, (no other person being about the premises) that Peychaud, the maker of the note, was dead."

Vinot, the notary's clerk, states the note was protested on the last day of grace, being the 27th February, 1834. That on the day of the protest, he made demand of payment of the note, at the domicile of Mr. Peychaud, who was then a corpse in the house, and was told by a mulatto woman, the only person present, that it was the day of the funeral.

It was proved the defendant had notice of this protest. The evidence also showed, that the maker of the note left a widow and two brothers.

The district judge was of opinion no other demand was necessary, than simply to protest the note for non-payment, and notify the endorser thereof, and that he would be held liable. The court relied on the case of *Hale vs. Burr*, 12 *Mass. Reports*, 86, in support of its opinion. Judgment was given for the plaintiff, and the defendant appealed.

Lockett, for the plaintiff, insisted that this case did not come within any of the rules or principles established in former cases. That no demand was necessary in this case, but that the endorser was simply to be notified of the non-payment of the note, and that he would be looked to for payment.

2. He relies on the reasons and authorities referred to in the opinion of the district judge, as being correct, and which should prevail in this case.

Roselius and Mazureau, for the defendant, argued from the following points and authorities.

1. The defendant is not liable as endorser, because no demand of payment was made on the widow or heirs of the deceased, even at the domicile of the maker of the note; nor is there any thing equivalent to a demand of payment in this case.

2. A demand is absolutely necessary to be made on the maker of a note or bill, or of his heirs, or on his legal representative, if he be dead. Due diligence must be used to discover their residence; and none of these pre-requisites having been complied with in this case, the endorser is thereby discharged. *Chitty on Bills*, 268, *Am. ed.* 1817. *Ed. of* 1828, p. 317. *Bayley do.* 128. 2 *Practical Abr. of Com. Law Cases*, 288, 292. 3 *Peters*, 89. 7 *Ib.* 364. 1 *Pardessus*, 392. *Pothier Contrat de Change*, No. 146.

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Martin J., delivered the opinion of the court.

The defendant is sued as endorser of a promissory note, for one thousand dollars, executed by Peychaud. Judgment was rendered against him for the amount claimed. He now claims a reversal of the judgment, on the ground that he was condemned as endorser to pay the sum demanded, when payment was never demanded from the maker, nor from any person representing him, or succeeding to his rights and obligations.

The record shows that the maker of the note, died on the last day of grace, or during the night preceding it. That when the notary's clerk called at the house and late domicile of the drawer of the note sued on, to demand payment, he found no person present, except a mulatto woman, who informed him of the death of Peychaud, and pointed him to the corpse in the coffin. The note was then protested without any inquiry or demand being made, of any heir or representative of the deceased.

It is clear that no recourse can be had against the endorser of a note, until a demand has been made on the maker, if living, or on his heir or legal representative after his death, unless the impossibility of making such a demand is made apparent. This has not been shown in the present case. The authorities on this point, and which support the position here laid down, are numerous; of the highest character and authority, and conclusive on this subject. *Chitty on Bills*, 317, *ed.* 1828. *Bayley do.* 128. 2 *Practical Abr. of Am. Cases*, 288, 292. 3 *Peters*, 89. 7 *Ib.* 287. 7 *Martin*, 364. 1 *Pardessus*, 392. *Pothier Contrat de Change*, No. 146.

No recovery can be had of the endorser until demand of payment has been made on the drawer or maker, or on his heirs or legal representatives, if he be dead, unless the impossibility of making such a demand is shown.

So where the maker of a note died on the last day of grace, the notary on calling at his domicile being informed of his death, protested the note for non-payment and notified the endorser thereof: *Held*, that there was no demand of payment sufficient to bind the endorser.

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OLIVIER
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ANDRY.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that judgment be entered for the defendant, with costs in both courts.

OLIVIER vs. ANDRY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The endorser of a note is not entitled to relief, on the ground of error or fraud, because the previous endorsement is a forgery committed by the drawer, unless he shows that such error was caused by the plaintiff, or that he participated in the fraud.

Whether the endorsement of a note was made for the accommodation of the drawer, or taken in the regular course of business, the holder can look to his immediate endorser, even if the endorsement preceding it is a forgery.

Every endorsement is essentially an original contract, equivalent to drawing a bill in favor of the holder, on the acceptor or obligor.

This is an action on a promissory note, protested, for four thousand dollars, against the second and last endorser, drawn by A. Foucher, jr. to the order of F. Saulet, on which his name was endorsed, and which was subsequently endorsed by the defendant.

The defendant admitted his signature and endorsement; but averred that the endorsement of Saulet was a forgery, known to the drawer thereof, for whose use and accommodation he endorsed the note; and that his endorsement was fraudulently obtained by the drawer's counterfeiting Saulet's endorsement, and without consideration.

The evidence showed that the plaintiff refused to take the note sued on, until the defendant assured him his endorsement was genuine. He then took it in renewal of another note of

the same drawer. It was also shown the note was duly protested for non-payment, and notice thereof given to the defendant. The defendant proved the endorsement of Saulet to be a forgery, committed by the drawer of the note.

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On these pleadings and evidence, the cause was submitted to a jury.

The district judge refused to charge the jury, "that the endorser on a note, by the mere fact of endorsement, guaranteed the genuineness of the signatures of the preceding parties thereto, to the subsequent endorsees and holders." But the judge charged in substance, that if the jury believed the plaintiff, who is the holder, was a party to the contract, by which the note in question was drawn and endorsed by all the parties to it, the name of Saulet being forged, is a fraud, which entered into the original contract, against which Andry the last endorser may avail himself; but if the holder was no party to the original contract, but took the note in the course of business, or discounted it after it was made, without any previous agreement with the parties to it, the forgery of Saulet's name as the first endorser, is no defence to the defendant, who is the second and last endorser.

The jury returned a verdict for the plaintiff. The defendant moved for a new trial, on the ground that the verdict was contrary to law and evidence, which being overruled and judgment rendered confirming the verdict, the defendant appealed.

Benjamin, for the plaintiff.

1. The only question which this cause presents is, whether in an action against an endorser on a negotiable note, the fact that a prior endorsement is forged, forms a legal defence against a *bonâ fide* holder.

2. The plaintiff contends that the defendant, by endorsing the note sued on, guaranteed and admitted the signature of every antecedent party, and is liable even though such signatures were forged. This principle is fully established by the

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following authorities. *Bayley on Bills*, 312-13. *Chitty on Bills*, 397. 1 *Lord Raymond*, 443. 2 *Campbell, N. P. C.* 182. 10 *Wheaton*, 353.

3. But it was argued for the defendant in the court below, that this was an accommodation endorsement. This court has frequently decided that, in relation to third persons and *bonâ fide* holders, the obligations of accommodation endorsers were co-extensive with those of endorsers of business paper. See the cases of *Nolte vs. Their creditors*, 7 *Martin, N. S.* 12. *Weir vs. Cox*, 7 *Martin, N. S.* 369. *Dorsey vs. Their creditors*, 7 *Martin, N. S.* 499.

De Armas, for the defendant and appellant, insisted that the name of the first endorser being proved to be forged on the note, was sufficient cause to exonerate and discharge the defendant from his endorsement.

2. That the defendant endorsed the note in error, supposing the preceding endorsement to be genuine, which alone is sufficient to annul the engagement he thereby contracted. *La. Code*, 1875, 1876.

3. The engagement or contract of endorsement is void, by the nullity resulting from the fraud committed by one of the parties, to wit: the drawer of the note. *La. Code*, 1841-2.

Bullard, J., delivered the opinion of the court.

This suit is brought by the holder against the endorsers of a promissory note, and the record furnishes evidence of the endorsement, of a demand and protest, with due notice of non-payment.

The endorser of a note is not entitled to relief on the ground of error or fraud, because the previous endorsement is a forgery committed by the drawer, unless he shows that such error was caused by the plaintiff, or that he participated in the fraud.

The defence relied on is, that a previous endorsement on the note was not genuine but a forgery committed by the drawer himself, and that the note was endorsed by the defendant through error, he believing the previous endorsement to be genuine. The counsel for the appellant, in support of this ground, refers us to articles, 1875 and 1876 of the Louisiana Code. We are of opinion, that he is not entitled to be relieved on the ground of error or fraud, without showing

that such error was caused by the plaintiff, or that he participated in the fraud. Such in substance was the charge of the judge, on the trial in the first instance, and we think it correct. The plaintiff took the note in renewal of another by the same drawer, after making inquiry of the defendant, whether his endorsement was genuine, who assured him that it was. Nothing was said about the previous endorsement of Saulet. The plaintiff, therefore, took the note on the credit of the defendant's endorsement, and no privity is shown between the plaintiff and the drawer, in relation to the forgery. Whether the endorsement was for the accommodation of the maker, or in the regular course of business, is, in our opinion, immaterial. Every endorsement is essentially an original contract, equivalent to the drawing of a new bill in favor of the holder, on the acceptor or obligor. The obligation of the endorser is, that if the obligor or acceptor does not pay at maturity, he will pay, on due notice of the dishonor of the bill. The forgery of a previous endorsement, does not release him from that obligation towards a *bonâ fide* holder, who took the note on the credit of his endorsement. The doctrine on the subject appears well settled, and in our opinion the verdict of the jury was legal and correct. *Chitty on Bills*, 484.

It has been ruled in England, that the holder may declare against his immediate endorser, as on a bill of exchange, directed to the acceptor and payable to the plaintiff. *Ib.*, 461.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Whether the endorsement of a note was made for the accommodation of the drawer, or taken in the regular course of business, the holder can look to his immediate endorser, even if the endorsement preceding it is a forgery.

Every endorsement is essentially an original contract, equivalent to drawing a bill in favor of the holder on the acceptor or obligor.

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BOREH, f. m. c.

vs.

KELLAR.

BOREH, f. m. c. vs. KELLAR.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where a judgment was rendered by default and signed according to law after the cause was set down for trial and the defendant notified thereof, he cannot afterwards obtain relief, by having the judgment set aside, and the cause tried *de novo*.

This is an action to recover from the defendant a slave, alleged to be worth eight hundred dollars, and his hire amounting to one hundred and fifty dollars in addition ; which slave the plaintiff alleges, is in the possession of said defendant, who refuses to deliver him or to pay the amount of his hire.

The defendant pleaded a general denial. The counsel who put in the answer of the defendant, afterwards erased his name from the case, which was set for trial on a particular day, and the defendant notified in person to attend.

The plaintiff went on and took judgment by default, and which after the lapse of three judicial days, was signed by the judge.

The defendant filed his affidavit with that of his counsel setting forth a variety of circumstances, which caused a misapprehension in relation to the attorney who was to defend him, and in consequence of which, no defence was made, and averring he has a good defence to the plaintiff's action, which he has ever been ready to make. He prays that the judgment be opened and the cause tried *de novo*.

The parish judge overruled the application and the defendant appealed.

Soulé, for the plaintiff and appellee.

L. C. Duncan, for the appellant.

Mathews, J., delivered the opinion of the court.

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In this case it appears by the record, that an answer had been filed on the part of the defendant, the cause at issue and regularly set down for trial. At the trial no person appeared to sustain the defence, nor did the defendant appear himself, although summoned.

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vs.
KILLAR.

The case was consequently tried *ex parte*, and judgment rendered in favor of the plaintiff, and signed by the judge three days after its rendition. In this state of things a motion was made in behalf of the defendant, to set aside the judgment thus pronounced and to have the case tried *de novo*, which being overruled by the court, the defendant appealed.

Where a judgment was rendered by default and signed according to law, after the cause was set down for trial and the defendant notified thereof, he cannot afterwards obtain relief by having the judgment set aside and the cause tried *de novo*.

The interests of the appellant seem to have been neglected in the court below, if he really has a good defence. But who is to blame for this negligence does not appear. In all events he cannot be relieved without a palpable violation of the rules of practice, on the subject of trial and judgment. See the case of *Small vs. Flint and Thomas*, *ante*, 352.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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HERMANN ET AL.
vs.
LOU. STATE
INSURANCE CO.

HERMANN & SON vs. LOUISIANA STATE INSURANCE CO.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where A takes out a policy of insurance on a vessel, for whom it might concern, takes in a partner in the ownership of the vessel insured, and afterwards transfers the policy by special endorsement in his individual capacity to the plaintiffs, who show a total loss, payment of the loss to them, will liberate the underwriters. They contracted with A, and whether as principal or agent is immaterial.

Where the plaintiffs and intervening parties unite in a prayer, that the defendant be condemned to pay the sum demanded, and his liability is established, he will be required to deposit the money in court, to abide the final decision between the claimants.

This is an action to recover of the Louisiana State Insurance Company, the sum of four thousand dollars, on a policy of insurance taken out by Alexander Baron, on the schooner Eliza Thomas, "for whom it might concern."

The plaintiffs allege they are the transferees of said policy, and entitled to recover its amount. That the interest and ownership of said vessel was in Baron and Dufart, which has been lost by the perils insured against, and abandoned to the underwriters, of which they have had due notice.

The insurance company pleaded a general denial; admitted the execution of the policy, but specially denied that Baron and Dufart had any interest in the vessel as alleged, or that any proof was ever made thereof. They aver that any amount which may be due on said policy, has been seized under writs of *feri facias*, one in the case of Kohn & Bordier vs. A. Baron, and the other in the case of Delpauch vs. Dufart, of which matters they pray judgment and for general relief.

The evidence of the case shows, that on the 10th July, 1833, A. Baron caused insurance for four thousand dollars, for account of whom it might concern, to be made on the schooner Eliza Thomas, and on the 7th March, 1834, transferred the

policy by special endorsement, in his individual capacity to the plaintiffs.

A loss within the policy has been admitted and adjusted, at three thousand nine hundred and twenty dollars. No proof of interest was made until the present time.

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The creditors of Baron and those of Dufart have intervened, but the case was tried as between the plaintiffs and the insurance company.

The plaintiffs produced in evidence an act of sale from Lesseps to Dufart, dated the 10th December, 1832; also, articles of partnership between Dufart & Baron, dated the 1st July, 1833, by which the schooner Eliza Thomas was put into the partnership.

On these pleadings and the testimony adduced by the plaintiffs, the cause was submitted to the court. The district judge was of opinion the *interest* in the property insured, was in Baron and Dufart, and that the former by his individual endorsement, did not transfer this interest to the plaintiffs. Judgment of non-suit was entered, from which the plaintiffs appealed.

Strawbridge, for the plaintiffs and appellants.

Eustis, contra.

Bullard, J., delivered the opinion of the court.

This suit was instituted by the plaintiffs as assignees of a policy of insurance effected by A. Baron, on account of whom it might concern, on the schooner Eliza Thomas, and subscribed by the defendants for four thousand dollars. They allege a total loss by the perils insured against, and a transfer to them of all interest in the policy, with notice to the underwriters, and that the interest and ownership of the schooner, was in Baron and Dufart.

The defendants deny generally the allegations in the petition, except the execution of the policy, and specially the interest in the schooner as alleged, or that any proof was ever

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made of it. The total loss is admitted and adjusted at three thousand nine hundred and twenty dollars.

Previously to the inception of the suit, a writ of *fiery facias* which issued on a judgment recovered by Kohn & Bordier, against A. Baron, was levied on the rights, credits, moneys, effects, &c. of Baron in the hands of the defendants. Another execution in the case of Delpauch *vs.* Dufart, was levied on the same day, in the same manner, and particularly on the amount of the insurance on the schooner.

Kohn & Bordier intervened in this suit, and set up their right under the seizure in execution, denying any legal assignment by Baron to Hermann & Son. They pray that the defendants may be ordered to pay in court the amount due on the policy, and finally, that it may be adjudged to them in virtue of the seizure.

Antoine Delpauch, the other seizing creditor, also, intervened, claiming the amount as the property of Dufart, who he alleges was the true and sole owner of the schooner. He prays that the money may be deposited in court.

The case was tried in the District Court, only as between the plaintiffs as transferees of the policy and the insurance office; and the court being of opinion that the whole interest in the policy did not pass by the assignment of Baron, pronounced judgment of non-suit, from which the plaintiffs, and Kohn & Bordier appealed.

Where A takes out a policy of insurance on a vessel for whom it might concern, takes in a partner in the ownership of the vessel insured, and afterwards transfers the policy by special endorsement in his individual capacity to the plaintiffs, who show a total loss, payment of the loss to them will liberate the underwriters. They contracted with A, and whether as principal or agent is immaterial.

The record furnishes such evidence of interest and a total loss, as to establish the liability of the defendants as underwriters of the policy. Whether Baron, with whom they contracted *for whom it might concern*, had a right to retain the whole amount when received, is a question which concerns him and those who claim a joint interest with him; but that a payment of the whole loss to him, would have liberated the insurers we do not doubt. They contracted with him, and whether as principal or as agent is quite immaterial. But if that were doubtful, the seizing creditors of his partner made themselves parties, and united in the prayer, that the defendants should be condemned to pay the loss, leaving the question still open to be decided by the court, whether Baron

or his assignees are entitled to retain the whole amount, or Dufart, his acknowledged partner, to come in for a share. That question is still open, as between the original plaintiffs and the intervening creditors of Dufart, as well as whether the creditors of Baron himself, are bound by his transfer to Hermann & Son, or in other words, whether as to them, that transfer was complete.

We are, therefore, of opinion, that the court erred in pronouncing judgment of non-suit against the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed ; and proceeding to give such judgment, as in our opinion, ought to have been rendered below ; it is further ordered and adjudged, that the defendants deposit in the District Court, the sum of three thousand nine hundred and twenty dollars, with interest at five per cent. from judicial demand, and that they pay the costs of the District Court, as to the original plaintiffs only, together with the costs of this appeal ; and it is further ordered, that the case be remanded to the District Court for further proceedings, as between the intervenors and the plaintiffs, all other costs to abide the final decision of the cause.

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Where the plaintiffs and intervening parties unite in a prayer that the defendant be condemned to pay the sum demanded, and his liability is established, he will be required to deposit the money in court to abide the final decision between the claimants.

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STEWART
vs.
PAULDING.

STEWART vs. PAULDING.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the bidder to whom property is adjudicated at an auction sale, fails to comply with the terms and conditions of the adjudication, the seller may, at the end of ten days after the customary advertisements, re-sell the property, by advertising it according to law, ten days, and the bidder is liable for the deficiency in *price*, between the first and the second sale.

Neither the vendor or bidder, is obliged to perform his part of the terms of an auction sale, until requested to do so by the other.

The vendor of an auction sale has the choice of two remedies, in case of non-compliance by the bidder, *i. e.*, to demand the price, or have the property re-sold on account of the latter.

Where the judge *a quo* states the law in the way most favorable to the defendant in his charge to the jury, the latter has no cause to complain, and the verdict in this respect will not be disturbed.

This is an action by the vendor of an auction sale, to recover of the defendant two thousand and twenty dollars, the difference in price and commissions on the re-sale, between the first and second adjudications, in consequence of the bidder failing to comply with the first.

The defendant pleaded a general denial, and averred that the plaintiff could not make him a good title to the property bid off by him, within ten days after the adjudication, in consequence of which the sale became null and void; that after the property was put up and advertised to be re-sold, the sale was countermanded and postponed, so that the last sale can have no effect or validity against the defendant.

De Armas, witness for plaintiff, deposed, that on the 17th April, 1833, the plaintiff caused to be sold at public auction, a lot of ground with the improvements, which was adjudicated to the defendant, as the highest and last bidder, for eleven thousand eight hundred dollars. The plaintiff told witness he had agreed with the attorney of the defendant, to cancel

the sale if the title was not good, and requested witness to examine it with the defendant's attorney, which he did, and they found the titles to be correct; that the attorney of the defendant came to witness the same day, and told him that a deed of sale could be prepared, and a safe title passed; that some days after deponent saw the defendant, who told him he had arranged his affairs to go to the north, and would not take the property, inasmuch as he had agreed with the plaintiff to cancel the sale.

The lot was re-sold on the defendant's account, for ten thousand dollars. The difference in price was one thousand eight hundred dollars, and two hundred and twenty dollars commission on the re-sale.

The *procès verbaux* of both sales, and the notices and advertisements of the second sale were produced, and the testimony of the auctioneers taken down in writing, constituted the principal part of the evidence on which the cause was tried.

The counsel for the defendant, excepted to the charge of the judge to the jury before they retired. The charge is fully set forth in the opinion of the court, delivered by judge *Martin*.

The jury returned a verdict for the plaintiff, on which judgment was rendered for the sum claimed. The defendant appealed.

Sterrett, for the plaintiff.

Hennen, contra.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment, which condemns him to pay the difference between the price, at which certain property was adjudicated to him at the first sale, and that for which it was adjudicated on a re-sale at public auction, on his refusal to comply with the terms and conditions of the first adjudication.

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STEWART
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PAULSING.

Where the bidder to whom property is adjudicated at an auction sale, fails to comply with the terms and conditions of the adjudication, the seller may at the end of ten days after the customary advertisements, re-sell the property by advertising it according to law, ten days, and the bidder is liable for the deficiency in price between the first and second sales.

Neither the vendor or bidder is obliged to perform his part of the terms of an auction sale, until requested to do so by the other.

The vendor of an auction sale, has the choice of two remedies in case of non-compliance by the bidder, *i. e.* to demand the price, or have the property re-sold on account of the latter.

Where the judge *a quo* states the law in the way most favorable to the defendant in his charge to the jury, the latter has no cause to complain, and the verdict in this respect will not be disturbed.

The attention of this court is first drawn, by the counsel of the appellant, to a bill of exceptions taken to the charge of the district judge, delivered to the jury at the close of the trial. The judge told the jury, that on a non-compliance with the terms and conditions of an auction sale, by the last and highest bidder, to whom the property has been adjudicated, at the end of ten days, and after the customary advertisements, the property may be re-sold, and the first bidder is liable for any deficiency between the price of the property at the first sale, and that of the second adjudication.

"That the second sale need not be advertised during more than ten days, but the advertisements must be published in at least two newspapers, in the French and English languages, and notices of such sale put up at the court-house and church-doors."

"That if they believed the testimony of De Armas, the demand for a compliance with the terms and conditions of sale, at the first adjudication of the property, was waived."

"That neither the vendor nor the bidder are obliged to perform their parts of the terms and conditions of sale, until requested to do so by the other."

"That the vendor has the choice of two remedies, the demand of the price, or a re-sale of the property."

As this case is presented, it does not appear to this court, that the defendant has cause, or any right to complain of any part of the charge of the judge *à quo*, to the jury. He seems to have stated the law in the way most favorable to the defendant.

On the merits, it is shown that the defendant declared himself unwilling to comply with the terms and conditions of the first adjudication, on the most frivolous grounds, viz: that he was about making a trip to the northward. The only doubt that may arise in his favor, relates to the question of fact, whether the advertisements were duly made and published. The law on this part of the case was particularly stated, and explained to the jury in the way most favorable to the defence, in the charge of the court. The jury were satisfied as to the facts, and the court expressed its approval

of the verdict, by conforming its judgment thereto, without any attempt on the part of the defendant, to have the verdict set aside. *La. Code, art. 2589. 3 La- Reports, 395, 123. 4 Ibid., 150, 207, 258.*

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BANK.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

**PRIEUR & LABATUT vs. THE PRESIDENT AND DIRECTORS
OF THE COMMERCIAL BANK OF NEW-ORLEANS.**

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In a suit, claiming of the defendants the right to exercise a certain office, withheld from them, the plaintiffs, with a view of securing the right to appeal, in case the judgment is adverse to their pretensions, may claim damages to an amount sufficient to give the appellate court jurisdiction.

The board of directors of the Commercial Bank of New-Orleans, is required by its charter, to consist of thirteen members, eleven to be chosen by the ordinary stockholders, and two by the city council, the city also being a stockholder: *Held*, that according to the charter, there is no distinction among the directors; they *all* have the right of voting, to fill all vacancies that may happen in either class of directors, in the board of which they are all members.

Where certain directors of a bank are refused by the majority, to exercise the rights in the board, appertaining to their office as directors, the court will award a *mandamus*, commanding that the prohibited directors be restored to the exercise of their rights.

In this case, the plaintiffs petitioned the District Court for a *mandamus*, directed to the president and directors of the Commercial Bank of New-Orleans, commanding them to allow the plaintiffs, who are the directors appointed on the

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part of the city council of New-Orleans, to vote as any other directors in said board, to fill all vacancies that have and may happen, as is authorised by the charter; and that the board of directors be enjoined from proceeding in any election, until these petitioners are heard in court, their rights as directors recognised, and they admitted to the full exercise thereof.

The counsel for the Bank answered the petition, and averred that the eleven directors elected by the stockholders, have the exclusive right to fill all vacancies happening in that class of directors, and in which the directors appointed by the city council of New-Orleans cannot participate.

The charter of the bank provides, that the board shall consist of thirteen directors, eleven of whom to be chosen by the ordinary stockholders, and two by the city council of New-Orleans, the city being also a stockholder, to the amount of five thousand shares.

The district judge was of opinion, that by the 8th section of the charter "the power of filling vacancies in the board of directors is vested entirely in the board, in which all the directors participate equally," granted *the mandamus* as prayed for. The president and remaining directors appealed.

Eustis, for the petitioners and appellees,

Conrad, contra.

Martin J., delivered the opinion of the court.

In this case, "the president and directors of the Commercial Bank of New-Orleans," are appellants from the decision of the District Court, by which they are commanded to allow the plaintiffs and appellees, (who are the directors appointed by the city council of New-Orleans) to vote as directors, for filling a vacancy, which has occurred in the board of directors of that institution.

The appellees pray that the appeal be dismissed, on the ground that the matter in dispute does not authorise an appeal, inasmuch as it is not susceptible of being appraised.

and estimated in money, and therefore *non-constat*, that its value is less than that which authorises this court to act.

It is the misfortune of the appellees, probably, that with the view of securing to themselves the right of having the judgment of the District Court examined in this, in case it was adverse to their pretensions, they have claimed damages to the amount of four hundred dollars. The appeal must therefore be sustained.

On the merits of the case, it appears to us that the judgment of the District Court is perfectly correct.

The 8th section of the act of incorporation of the Commercial Bank, provides "that in case of the death, resignation, failure, or removal from the state of any director, his place shall be filled by a new choice, made by the directors, for the remainder of the year."

The 3d and 6th sections provide for the election of *thirteen* directors by the stockholders. By the 21st section, the city council of New-Orleans is authorised to appoint two directors out of the thirteen, provided by the 3d and 6th sections, and the remaining *eleven* continue to be appointed by the rest of the stockholders, the city subscribing for five thousand shares.

One of the eleven directors appointed by the common stockholders, vacated his seat. The board of directors proceeded under the charter, to make choice of a director, to fill the vacancy for the remainder of the year, and the plaintiffs being the two directors sitting by appointment from the city council, claimed the right of voting in common with the other members of the board. This was refused by a majority of the board of directors. They immediately applied to the District Court for a *mandamus*, which was granted, directing the board to allow the directors appointed by the city council, the right of voting as other directors.

If the decision awarding the *mandamus* be incorrect, and if the directors elected by the ordinary stockholders, are entitled to exclude those appointed by the city council, when one of the former vacates his seat, it must follow that these directors are in their turn incapacitated to vote, if one of the two directors of the city vacates his seat, and that the remain-

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In a suit claiming of the defendants the right to exercise a certain office withheld from them, the plaintiffs, with a view of securing the right to appeal in case the judgment is adverse to their pretensions, may claim damages to an amount sufficient to give the appellate court jurisdiction.

Where certain directors of a bank are refused by the majority, to exercise the rights in the board appertaining to their office as directors, the court will award a *mandamus* commanding that the prohibited directors be restored to the exercise of their rights.

The board of directors of the Commercial Bank of New-Orleans is required by its charter to consist of thirteen members, eleven to be chosen by the ordinary stockholders and two by the city council, the city also being a stockholder: *Held*, that according to the charter there is no distinction

EASTERN DIST. ing one alone is to fill the vacancy. This cannot be, as no
January, 1835. individual director can alone constitute a board.

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 among the directors; they all have the right of voting to fill all vacancies that may happen in either class of directors in the board of which they are all members.

The act of incorporation has made no such distinction. All vacancies in the board are to be filled up in the same manner, i. e., by the board of directors, which is composed of thirteen members.

No recourse is provided for a recurrence to the original electors, that is to say, the stockholders or the city council, in order to fill an accidental vacancy.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

WRIGHT vs. M'NAIR ET AL.

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the judgment appealed from is not signed, the appeal will be dismissed with costs.

This suit was instituted for the recovery of five thousand dollars, which the plaintiff alleged the defendants owed him, for sundry pine logs furnished to them at their saw-mill, in the parish of St. Tammany. The plaintiff obtained a verdict for one thousand dollars, upon which the court rendered judgment on the minutes, but was not signed by the judge. After an unsuccessful attempt to obtain a new trial, the defendants appealed.

The case comes up without any statement of facts, made by the counsel or the judge, or any certificate of the judge or clerk, that the record contains all the evidence on which the cause was tried.

Preston, for the plaintiff, moved to dismiss the appeal, on the ground that there was no statement of facts made according to law, nor assignment of errors apparent on the face of the record. *Code of Practice*, art. 585, 602-3, 895-6.

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Hennen, for the defendants, insisted, as the judgment appealed from was not signed, the cause must be remanded for further proceedings.

2. The verdict of the jury is not supported by evidence; there being no demand to put the defendants *in mora*. No damages can be claimed.

3. The defendants being sued as joint owners of a steam saw-mill, can only in any case be made liable for their *virile* portions.

4. There is no evidence of any contract with M'Nair, one of the co-proprietors; he is therefore not bound, inasmuch as the partnership is not commercial, but special.

Mathews, J., delivered the opinion of the court.

This case is before the court, on a motion to dismiss the appeal, on the part of the appellee, on the ground that the record does not contain a statement of facts, &c.

The counsel for the appellants, agrees that the appeal must be dismissed, but for a different cause, alleging that the judgment of the court below was not signed by the judge. As this is a sufficient reason for sustaining the motion of the appellee, we deem it unnecessary to examine the ground relied on by his counsel.

Where the judgment appealed from is not signed, the appeal will be dismissed with costs.

It is, therefore, ordered, adjudged and decreed, that this appeal be dismissed at the costs of the appellants.

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BRADLEY
vs.
PROCTOR.

BRADLEY vs. PROCTOR.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the plaintiff, being dismissed by the defendant from finishing a certain job of work, relies upon the promise of the latter to have an estimation made of the work actually done and pay accordingly, but who neglected to cause such appraisement to be made, he ought to be bound by the estimation of appraisers appointed by himself : *Held*, that the plaintiff must show, either that the defendant concurred in the appointment of the experts, or that he was put legally in delay in relation to his promise, to make it binding.

This is an action for work and labor done by the plaintiff as a carpenter, on a sugar-house of the defendant, in which he claims a balance due, of six hundred and forty-two dollars forty-two cents, together with five hundred dollars in damages, for being dismissed before the work was completed.

The defendant pleaded the general issue; and denied specially that he was liable for any damages as alleged.

The evidence showed that while the plaintiff was at work on the defendant's sugar-house, under an agreement to do it by the job, the latter wrote him a note, "that the work done fell short of the contract, and he would not submit to it; that their contract was at an end, and he would have the work inspected and settle with the plaintiff agreeably to the value placed on it by the inspectors."

The defendant neglecting to have the inspection made, the plaintiff, nearly a month after his dismissal, called three house carpenters, who, in the presence of the defendant's overseer and son, sent to point out the defects, estimated the work actually done, at eight hundred and seventeen dollars forty-two cents, which after deducting a credit of one hundred and seventy-five dollars, leaves the sum sued for as due to the plaintiff.

The experts and others were called and examined as witnesses, touching the manner in which the work was done. The cause was submitted to a jury, without any counsel being present for the defendant, who found for the plaintiff, five hundred and fifty dollars, without allowing any damages.

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VS.
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The defendant had the verdict set aside, and a new trial awarded.

The case was tried by the court on a re-examination of the evidence produced by the parties. The district judge was of opinion upon the whole evidence of the case, that the plaintiff was entitled to one hundred and thirty-three dollars fifty cents, and gave judgment accordingly. The plaintiff being dissatisfied with the judgment, appealed.

Preston, for the plaintiff, insisted that the defendant was bound by his promise to pay the estimated value of the work actually done by the plaintiff; and failing himself to make the estimate as he promised, the latter had it done by master carpenters, who pronounced it reasonably good, and worth the sum sued for.

2. The defendant has proved by certain witnesses whom he called to examine the work, that it became necessary to pull it down. The time is not shown, but it is reasonable to suppose this examination was made, when the persons who made it undertook to pull it down, which was since the commencement of this suit.

3. No presumption can arise in favor of the defendant from taking down the work, because it is the act of a party to a suit while it is pending.

4. The district judge erred in not giving full credit to the testimony of the experts, who examined the work. They were men of experience and respectability.

Leigh, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff sues to recover the value of carpenter's work done by him, on the sugar-house of the defendant, under a

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BRADLEY
vs.
PROCTOR.

Where the plaintiff being dismissed by the defendant, from finishing a certain job of work, relies upon the promise of the latter, to have an estimation made of the work actually done, and pay accordingly, but who neglected to cause such appraisement to be made, he ought to be bound by the estimation of appraisers appointed by himself: *Held*, that the plaintiff must show, either that the defendant concurred in the appointment of the experts, or that he was put legally in delay in relation to his promise to make it binding.

contract to do a certain job, but which was not completed in consequence of his having been dismissed by the defendant, as he alleges, illegally. Judgment was rendered in his favor for a small part of his demand only, and he appealed.

The counsel for the plaintiff and appellant contends, that as the defendant offered, when he dismissed his client, to have an estimation made of the work actually done, and to pay accordingly, but neglected to cause such appraisement to be made, he ought to be bound by the estimate of appraisers appointed by himself, who estimated the work according to the account annexed to the petition. It is a sufficient answer to this argument to say, that if the appellant relies on that promise, he ought to show, either that the defendant concurred in the appointment of the experts, or that he was put legally in delay in relation to his promise. Neither of these is shown, and the court acted properly in deciding as to the value of the services rendered, according to the evidence offered on the trial, independently of any appraisement.

It is further urged, that no presumption results in favor of the defendant, from the fact that he took down and threw aside the work. It would be unreasonable as well as uncharitable to suppose, that any man would destroy what was useful to himself, out of mere wantonness. At the same time the mere fact that he demolished the work, ought to have no weight, unless it is shown, that it was either useless or not made according to contract.

The evidence relating to the value of the work done is contradictory. Some of the witnesses considering it reasonably good, and others of no value to the defendant. It is not pretended that the work was done strictly according to contract, and particular defects are shown, even by the witnesses of the plaintiff, which leave an impression on the mind, that the work was not done in a workman-like manner. The court below, with better means than we possess of testing the comparative credibility of the witnesses, allowed the plaintiff the full amount charged for extra work, and rejected altogether the charge for work done on the roof which was demolished. The evidence does not in our opinion, prepon-

derate so decidedly in favor of the plaintiff, as to authorise us to amend the judgment.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

ICAR
vs.
SUARES.

ICAR vs. SUARES.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The rehibitory action, for the rescission of the sale and return of the price of a slave, will be sustained, for any vice or defect which renders the slave either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vices.

This is a redhibitory action, to annul the sale of a slave, and recover back the price, with the fees and costs of sale, on the ground of the redhibitory vices of craziness and running away. The plaintiff alleges he purchased a slave named Kate, from the defendant, for which he paid five hundred dollars in cash; that three or four days afterwards, it was discovered the slave was crazy and run away. He further alleges, that these vices and defects were known to the defendant; and that he has tendered the slave, demanded the annulment of the sale and return of the price, with the notary's fees, which the defendant refuses to comply with, and for which he prays judgment.

The defendant pleaded the general issue, and prays for general relief, and judgment in his behalf.

Several witnesses were sworn and examined on both sides. The plaintiff showed that the slave was very stupid; that on being told to do one thing she would do another; that she was unsafe to be trusted about the house, on account of the

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ICAR
VS.
SWANN.

danger of setting fire to it; that she wandered off, and was finally put in the parish jail of an adjoining parish, as a runaway.

The defendant's testimony went to show, that the plaintiff took one or two slaves on trial, and finally concluded to buy Kate; that some days after she took the slave, she came to the store and informed witness she was very well pleased, and requested the defendant to pass an act of sale; that some days after the sale, plaintiff informed witness that Kate had absconded.

The district judge, in rendering judgment in favor of the plaintiff, remarked, "that with regard to the mental malady of the slave, the evidence and a *personal inspection* satisfied him, she was so far destitute of mental capacity, as to render her either absolutely useless, or the use so inconvenient, that it was to be presumed the buyer would not have purchased, had she known of the vice." The defendant appealed.

Cannon, for the plaintiff, urged the affirmance of the judgment.

Roselius, for the defendant, made the following points.

1. The evidence has not established, that the slave *Kate* is a runaway; nor is it even shown, that she ran away from the plaintiff after the sale.
2. With regard to the alleged craziness of the slave, the proof is entirely insufficient; the utmost that can be inferred from the testimony, is that she was rather stupid. This is an apparent defect, if a redhibitory defect at all, against which the defendant did not warrant the slave.
3. The district judge erred in taking into consideration his own impressions, derived from the appearance of the slave, from his personal inspection: he was not examined as a witness in the cause; and it is not even alleged that he possesses any particular skill on this subject.

Bullard, J., delivered the opinion of the court.

The plaintiff seeks to be relieved from a contract, by which she purchased from the defendant a recently imported slave, on account of two redhibitory vices, to wit: the habit of running away and madness. Judgment was rendered in his favor, and the defendant appealed.

The case turns altogether on matters of fact. We doubt whether the evidence establishes the habit of running away previous to the sale, but the opinion we have formed on the second ground, renders it unnecessary to give any positive opinion on the first.

It is contended that Kate was not crazy, but only stupid, and that stupidity is not madness, but on the contrary an apparent defect, against which the defendant did not warrant. Mere dullness of look is certainly apparent, but that degree of stupidity or want of intelligence, which results from a defective organization, is rather idiocy than stupidity. The code enumerates madness (*folie*) among the absolute vices of slaves, which give rise to the action of redhibition. Whether the subject of this action is idiotick from nativity, or is laboring under one of the numberless derangements of an intellect originally sound, is a question which cannot be answered, without further knowledge of her history, than the record affords. Nor do we consider it material, inasmuch as the code has declared, that a sale may be avoided on account of any vice or defect, which renders the thing either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vice. *La. Code, art. 2496.*

We are satisfied from the evidence in the record, independently of the impression made on the mind of the judge, by personal inspection, that the slave in question was wholly, and perhaps worse than useless.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.
January, 1835.

**READ
TO
SQUARS.**

The redhibitory action, for the rescission of the sale and return of the price of a slave will be sustained, for any vice or defect which renders the slave either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vices.

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COX
vs.
MITCHELL.

COX vs. MITCHELL.

**APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.**

In an action on the balance of account due, the plaintiff has a right to interrogate the defendant, touching the agreement of the latter to pay conventional interest.

The writing is not of the essence of an agreement to pay interest at ten per cent., but that the legislature only intended to exclude testimonial proof of such agreement.

Where the defendant neglects to answer interrogatories annexed to the petition, the facts required to be disclosed, ought to be taken as confessed.

This is an action to recover the balance of an account, due by the defendant to the plaintiff as a commission merchant, for advances, amounting to one thousand seven hundred and ninety-nine dollars fifty-three cents, payable the 9th May, 1831. The petition charges that the defendant agreed to pay conventional interest on each advance, from the time it was made until payment. Interest at this rate, is included on each advance, up to the time of striking the general balance now claimed, and the same rate of interest is claimed on this balance until payment.

The plaintiff annexed the following interrogatory to be answered by the defendant :

"Did you or not agree to pay the petitioner an interest at the rate of *ten per cent. per annum*, on all sums advanced by him to you from the day on which the advances were made, until their final reimbursement?"

The defendant pleaded a general denial, and averred that he and one Kendall were joint owners of a sugar plantation, and in the year 1830, consigned to the defendant, one hundred and twenty thousand pounds of sugar, and one thousand seven hundred gallons of molasses to be sold on their joint account; and which he expressly charges was fraudulently

and collusively sold to Kendall or some other person unknown to him, by said Cox, at three cents per pound, being one-half less than its real value, and at a loss of one thousand six hundred dollars, for which he prays judgment, and that the plaintiffs demand be rejected.

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COX
VS.
MITCHELL.

The plaintiff filed an amended petition, alleging that the sugar and molasses mentioned in the answer, is duly accounted for and included in the general account current annexed to his original petition, the balance of which is yet due as claimed. He then propounded a number of interrogatories to the defendant, which he requires to be answered, explaining and proving various items in the account, showing the business transactions between them, together with detailed accounts annexed. The amended petition and interrogatories were duly served on the defendant.

In an amended answer, the defendant charged the plaintiff with the additional sum of one thousand one hundred and twenty-four dollars eighty-nine cents, and also with five hundred dollars, the proceeds of thirty-four bales of tobacco, for which sums he prays judgment.

Before trial the defendant moved to have the interrogatory, requiring his answer concerning the agreement to pay ten per cent. interest on all the advances made to him by the plaintiff, stricken out, on the ground that it tended to establish a fact which could only be proved by written evidence. The court sustained the motion, and the plaintiff excepted to its opinion.

The defendant neglected to answer the series of interrogatories annexed to the supplemental petition, touching and explaining the various accounts and transactions between the parties.

Upon hearing a mass of testimony on the merits, and the explanations of the parties by their counsel respectively, the jury returned a verdict in favor of the defendant, for one thousand three hundred and eighteen dollars; after an unsuccessful effort to obtain a new trial, judgment being rendered in conformity to the verdict, the plaintiff appealed.

EASTERN DIST.
January, 1835.

COX
vs.
MITCHELL.

A. & J. Seghers, for the plaintiff.

The account sued on in this case, is completely established by the interrogatories propounded to the defendant, which are to be taken as confessed by the refusal and neglect of the defendant to answer them. It is proved further, by the testimony of Kendall, former partner of the defendant, by the vouchers annexed to the petitions, and by the admissions of counsel.

2. The sums set up by the defendant in his reconventional demand as alleged in his several answers, are all accounted for and fully explained in the accounts rendered by the plaintiff.

3. The district judge erred in ordering the first interrogatory propounded to the defendant to be stricken out, by which the plaintiff was deprived of his testimony concerning the agreement to pay conventional interest. *La. Code, art. 2255. 6 Martin, 280.*

4. The interrogatories propounded, relative to the several accounts and transactions between the parties, should have been ordered by the court to be taken as confessed, and all the facts stated therein as proved in favor of the plaintiff, and the jury instructed to receive them as proved and admitted. *Code of Practice, 349.*

5. The verdict of the jury is clearly contrary to the evidence of the case, and if this court is not willing to render a final judgment on the merits, on the evidence in the record, it will remand the case for a new trial, with directions that the defendant be required to answer relative to the agreement to pay conventional interest.

Nicholls & Taylor, contra.

Bullard, J., delivered the opinion of the court.

The appellant relies for a reversal of the judgment rendered against him, on the grounds, 1st. That the court erroneously dispensed the defendant from answering an interrogatory, annexed to the petition, by which the plaintiff sought to prove that the defendant had agreed to pay an interest at ten per

cent. on certain advances made by him, as commission merchant, which interest formed an item in the account annexed to the petition; and, 2d. That, although the defendant had neglected to answer certain interrogatories annexed to a supplemental petition, no effect was given to such neglect or refusal to answer, but that the facts, which, under those circumstances, should have been taken as confessed, were entirely overlooked by the jury in rendering their verdict.

We are of opinion that the court erred in striking out the interrogatory touching the defendant's agreement to pay conventional interest. It has been settled in this court, that writing is not of the essence of an agreement to pay interest at ten per cent., but that the legislature only intended to exclude testimonial proof of such agreements. 6 *Martin*, 278.

It is also clear, that if the defendant neglected to answer the interrogatories annexed to the supplemental petition, the facts required to be disclosed, ought to be taken *pro confessis*. But as the case cannot be examined on the merits, we express no opinion as to the correctness of the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, the verdict set aside, and the case remanded for a new trial, with directions to the judge not to dispense with the answer of the defendant to the interrogatory touching conventional interest, and that the appellee pay the costs of this appeal.

EASTERN DIST.
January, 1835.

COX
vs.
MITCHELL.

In an action on the balance of account due, the plaintiff has a right to interrogate the defendant, touching the agreement of the latter to pay conventional interest.

The writing is not of the essence of an agreement to pay interest at ten per cent., but that the legislature only intended to exclude testimonial proof of such agreement.

Where the defendant neglects to answer interrogatories annexed to the petition, the facts required to be disclosed, ought to be taken as confessed.

EASTERN DIST.
January, 1855.

CLARK ET ALA.
vs.
GIFFORD ET ALA.

CLARK ET ALA. vs. GIFFORD ET ALA.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The signal for *steam*, made by the captain of a vessel on entering the mouth of the Mississippi river, does not confer on him the obligation of a contract of towage, with the first tow-boat coming along side. Up to the time when the ship is actually taken in tow, and the voyage commenced, the captain of the vessel is at liberty to change his mind, and employ another boat.

No usage or custom of steam-boats and tow-boats, that the first coming along side of a ship, on a signal made for *steam*, has thereby an absolute towage contract, at an established rate, to tow the vessel into the port of New-Orleans, is *binding*, when such custom has only prevailed five or six years, among those having an interest in establishing it.

This is an action against the captain and owners of the ship Tarquin, to recover of them three hundred and fifty dollars, for an alleged breach of contract, to tow said ship from the Balize to New-Orleans.

The plaintiffs allege they are joint owners of the tow-boat *Huntress*, and that at the special instance and request of the master of said ship, made known by signal, they came along side, made fast, and commenced towing the ship, the contract being expressly and tacitly agreed on with the captain, to tow her to the city for three hundred and fifty dollars; when without any cause or reason, but merely through whim captain Gifford refused to be towed by the *Huntress*, and employed another boat. The plaintiffs now claim the sum of three hundred and fifty dollars, as the price due on their contract, in undertaking and agreeing to tow said ship to the city of New-Orleans, from the Balize.

The defendants pleaded a general denial.

The evidence on which the case was tried, is fully stated in the opinion of this court.

The parish judge decided, that the testimony established it as the prevailing rule or custom of tow-boats, on the Mississippi, that when a vessel makes signal for *steam*, the first boat that gets along side, is entitled to tow her up.

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CLARK ET AL.
VS.
GILFORD ET AL.

2. That this rule or custom being thus established, every vessel making signal for steam, comes under an implied contract, to be towed by the first boat coming along side.

3. An exception might probably exist, if the boat offering her services, was not of sufficient power.

4. It is in evidence in this case, that the tow-boat Huntress, on signal made from the ship Tarquin, was the first boat along side, and boarded, and after being nearly made fast, was discharged by the captain of the ship, and the tow-boat Grampus employed to tow her.

5. That the Grampus is shown by the testimony, to be of less power and speed than the Huntress.

6. That the price of towage is proved to be three hundred and fifty dollars. Judgment was rendered accordingly for this sum. After an unsuccessful attempt to obtain a new trial, the defendants appealed.

Roselius, for the plaintiff.

1. The contract is sufficiently proved. The captain of the Tarquin made a general signal for *steam*, which must be considered as a proposition, and the coming along side by the Huntress, was an acceptance of the proposition, by which the contract was completed. *La. Code*, 1792, *Ibid.*, 1811.

2. The usage is sufficiently shown, and may be considered as additional evidence of the contract. *La. Code*, 1958, 1961.

The *quantum* of damages is fully established by the evidence. *La. Code*, 1928.

T. Skidell, for the defendants. The custom or usage relied on, to sustain the plaintiffs' demand, should be repudiated.

1. Because it is in evidence, that the tow-boats have only been in use on the Mississippi, for about the last six years, and

EASTERN DIST. a custom cannot grow up and assume the force of law, in so short a period. *La. Code, art. 3.* 2 *Starkie, Note 450.*

CLARK ET AL. *Febrero, part 11, lib. 1, cap. 5, § 4, 26.* 1 *Pothier, Clef des Lois Romaines Coutume, 159.*

VS.
SIMPSON ET AL.

2. Even if a custom could be established in so short a time, yet the evidence adduced by plaintiff is not sufficient to prove its existence. 1 *Gallison, 444.* 1 *Martin, N. S. 192.* 2 *Starkie on Evidence, 448.* *Febrero, ubi super.*

3. Even were the custom sufficiently proven, it should not be recognised, because it is neither consistent with natural equity, nor with the spirit of positive laws on the subject of obligations. 1 *Pothier, 165.*

4. Although the court should consider, that under the circumstances, and by force of the usage set up, the defendant must be deemed to have contracted to employ the plaintiff to tow his vessel to New-Orleans, yet the damages given for the inexecution of this obligation are excessive, and should be reduced to the amount of loss actually sustained by plaintiff. *La. Code, 1924, 1928, sec. 1, 2, 3.*

Mathews J., delivered the opinion of the court.

This is a suit brought by the captain and owners of the steam-boat *Huntress*, employed as a tow-boat for vessels, passing between New-Orleans and the Balize, against the captain and owners of the ship *Tarquin*. The plaintiffs base their action on a contract for towing, made between the captain of the steam-boat and the captain of the ship, by which it was agreed between the parties, that the latter should be towed to New-Orleans by the former, at the usual or customary price for such a voyage of towing, which is averred to be three hundred and fifty dollars. Judgment for this sum was rendered against the defendant, in the court below, from which they appealed.

The testimony of the case shows it to be novel, and although not of much consequence as relates to the amount in controversy, it may be considered somewhat important, as

establishing principles concerning the interpretation of contracts like that on which the plaintiffs rely for a recovery in the present instance.

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It appears by the testimony, that the ship was at an anchor, in the south west pass of the Mississippi, having been piloted over the bar. At the same time, two tow-boats were laying some distance below her. A signal for steam appeared on board the ship, and these two boats got under way and approached her, the boat for the benefit of whose owners the value of the towage is claimed, and the *Grampus*. The former came first along side the ship, and was about making fast to her for the purpose of towing, when the captain of the vessel refused to be towed by her, and was finally, by agreement, towed to the city by the latter. These we believe to be all the important facts established by the testimony.

From these facts a question arises, whether any contract was created, binding on the parties, sufficient to compel the master of the tow-boat to convey the ship to the port of New-Orleans, and to oblige the captain of the latter to submit his vessel to be towed by the former, from the *terminus a quo* to the *terminus ad quam*, and to pay the usual price of such towage.

Contracts are either express or implied, from which obligations arise to do or not to do, &c. To their perfection they require the consent of two parties at least, or the concurrence of two wills. When this consent is made by words, in the ordinary mode of conveying ideas from one person to another, they are express; when an obligation results from the circumstances of a case, the contract is said to be implied or tacit, that is when the agreement is not entered into by words or writing, and although a contract may be made by signs, yet as they are not the ordinary mode of communicating ideas, such a contract must be viewed as partaking rather of the latter class than the former; but the obligations resulting from either species, may be enforced; in other words, the obligations arising from both, are what the law terms perfect.

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The signal for steam, made by the captain of a vessel, on entering the mouth of the Mississippi river, does not confer on him the obligation of a contract of towage with the first tow-boat coming along side. Up to the time when the ship is actually taken in tow, and the voyage commenced, the captain of the vessel is at liberty to change his mind, and employ another boat.

No usage or custom of steam-boats and tow-boats, that the first coming along side of a ship on a signal made for steam, has thereby an absolute towage contract, at an

The contract contended for on the part of the plaintiffs, is tacit, being made by signs, and if it were complete would produce reciprocal obligations on the parties, *i. e.*, if it necessarily results from the signal given by the captain of the ship, and the subsequent conduct of the master of the tow-boat, that the one asked the other to tow his vessel to New-Orleans, and the latter consented so to do, the contract would be complete, and obligatory on both the contracting parties; but on general principles of law, we do not think the facts of the case authorise such a conclusion. We take for granted, that the commanders of most of the vessels, if not all, arriving from sea at the mouths of the river, know that there are a number of steam-boats in the neighborhood, whose constant employment is to tow such vessels to the port of New-Orleans, and that their masters are always ready and willing to answer any signal for steam, by conducting that boat to the place of the signal. Such signal seems to us, to express nothing more on the part of a captain who makes it, than a wish or desire to have his ship aided in her progress by a steam-boat, but does not amount to an absolute consent and agreement to be towed by the first boat that may choose to come along side of his vessel, or any other that may subsequently come near to her. He would be at liberty to change his mind, and refuse to be towed, up to the time when his vessel was actually taken in tow, and the voyage commenced; and on such change of will, no contract would properly take place, in relation to any particular voyage. If therefore, the master of the vessel could refuse altogether to be towed, without violating any contract, because none had really been made, it follows as a corollary, that when two boats make their appearance, a commander of a ship may contract with the proper officer of one of them, as he may select, without any injury to any rights of the other, which was done in the present case. Though perhaps when on a signal for steam, only one boat approached the vessel, and the captain refused to be towed, he and his owner might be bound to remunerate the owner of the boat for the unnecessary trouble and expense

to which they may have been put, by the wavering and indecisive conduct of the person who caused such expense.

As to the arguments based on the proof of a pretended custom, prevailing amongst the different masters and owners of tow-boats, plying between the city and the Balize, we consider them as entitled to little consideration. It would be an extraordinary occurrence in legislation, established by custom and usage, to give to a few steam-boat captains, and the owners of tow-boats authority to make laws, in consequence of a usage which relates solely to their own interests, of a duration of not more than five or six years, to have a binding force on the owners of vessels over the whole world.

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established rate, to tow the vessels into the port of New-Orleans, is binding, when such custom has only prevailed five or six years among those having an interest in establishing it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that judgment be here entered for the defendants and appellants, as in case of non-suit, with costs in both courts.

KIMBALL & LILLY vs. NICHOLSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the decision of a case depends wholly on matters of fact, and when, on an examination of the testimony, it warrants the verdict of the jury, the judgment rendered thereon will not be disturbed.

This was an action to recover damages against the defendant, for the loss by fire of the steam-boat *Saratoga*, while in the custody of the defendant. The plaintiffs allege the boat was destroyed through the negligence, carelessness and fault of the defendant, for which he is personally liable.

The defendant pleaded a general denial, and that said boat had been legally seized under a writ of seizure, from

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the United States District Court, and was at the time of her accidental loss by fire, in his custody as marshal of the United States; and that said accident happened without his fault, for which he is not liable.

On these issues and pleadings the parties went to trial; a mass of testimony was taken, and the whole case submitted to a jury, who returned a verdict for the defendant. The plaintiffs appealed from the judgment confirming the verdict.

I. W. Smith, for the plaintiffs and appellants.

Conrad, contra.

Mathews, J., delivered the opinion of the court.

This is a suit against the defendant, who is marshal of the United States, for the Eastern District of the State of Louisiana, in which damages are claimed from him, on allegations of negligence and misconduct, in keeping and guarding the steam-boat *Saratoga*, (of which the plaintiffs were owners) whilst in his custody under seizure, by order of the District Court of the United States, &c.; the boat having been consumed by fire during that period.

Where the decision of a case depends wholly on matters of fact, and when, on an examination of the testimony, it warrants the verdict of the jury, the judgment rendered thereon, will not be disturbed.

The cause was submitted to a jury in the court below, who found a verdict for the defendant, and judgment being thereon rendered, the plaintiffs appealed.

The decision of the case depends wholly on matters of fact. We have examined the testimony, and are of opinion that it warrants the verdict and judgment of the court below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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HESSIAN vs. FERGUSON.

HESSIAN
vs.
FERGUSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a passenger engages his passage on deck or in the steerage, and in consequence of continued intoxication and ridiculous conduct, is made the butt and sport of the other passengers, without the interference of the captain, the latter is not liable in damages for such treatment during the voyage.

This is an action for damages against the defendant, as captain of the schooner Mayflower, for alleged ill treatment of the plaintiff, on a late voyage from Charleston to New-Orleans.

The defendant pleaded a general denial.

The evidence shows that the plaintiff was during a great portion of the voyage, in a state of mental derangement, occasioned by frequent and large potions of brandy, and while in that state his conduct was very odd, eccentric and ridiculous, so as to provoke the ridicule and pranks of the passengers on board. It did not appear that the captain interfered in any way; and the plaintiff received no personal injury or harm, except getting powder burnt from the flash of a pistol in his face.

On hearing all the testimony the district judge gave judgment for the defendant. The plaintiff appealed.

Kelly and Kennicutt for the plaintiff.

1. The defendant, as commander of the vessel, was bound to protect the plaintiff, a passenger on board, from insult and abuses which were continually heaped on him during the voyage.

2. The proof makes out a case of great hardship on the part of the plaintiff, for which he is entitled to exemplary damages. The judgment of the District Court should therefore be reversed.

Preston, contra.

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RUSSIAN
VS.
FERGUSON.

Bulford, J., delivered the opinion of the court.

The plaintiff complains, that having taken his passage as a cabin passenger on board a schooner commanded by the defendant, from Charleston to New-Orleans, he was during the passage grievously ill treated by him. That he was, after being at sea some days, forcibly expelled from the cabin, bound with ropes, exposed on deck without shelter, and not allowed sufficient food, to his damage one thousand dollars.

The judgment of the District Court was in favor of the defendant on the merits, and the plaintiff appealed.

The evidence clearly shows that the plaintiff engaged his passage on deck or in the steerage, and that he was not a cabin passenger. The captain was not, therefore, bound by contract to give him cabin room, nor perhaps provisions. But it appears that the plaintiff ate with the crew and fared as they did. In some respects he appears to have fared better; for although in common with the sailors he was put on short allowance, yet he did not stint himself in his allowance of brandy, of which he laid in abundant stores at Charleston. The consequence was, that during the voyage he gave unequivocal evidence of *mania à potu*, was on the look out for a ferry boat to take him ashore and could not sleep. Under these circumstances he became the butt of ridicule to other passengers on board, who appear to have amused themselves rather roughly at his expense. It is shown that the captain remonstrated with them on the subject and did nothing himself to annoy the plaintiff. The plaintiff received no personal injury, and we think with the court below, that no man ought to complain of being ridiculed when he has made himself ridiculous.

Where a passenger engages his passage on deck or in the steerage, and in consequence of continued intoxication and ridiculous conduct, is made the butt and sport of the other passengers, without the interference of the captain, the latter is not liable in damages for such treatment during the voyage.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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DELPEUCH vs. DUFART.

DELPEUCH
vs.
DUFART.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In an action by the principal against his factor, to account and pay over a balance for merchandise sold on consignment, it devolves on the latter to show he has not received any money by the sale of the goods, or collected any of the debts, and to establish this to be the case *without his fault*, in order to avoid being liable.

This is an action on behalf of the late commercial firm of Delpeuch & Co., against the defendant as a factor, to compel him to pay over the balance due on an invoice of goods, sold by him at Tampico, on account of the plaintiff's late firm.

The petition charges, that the firm of Delpeuch & Co. consigned to the defendant, then residing at Tampico, an invoice of goods, which the latter sold together with goods of his own, to the firm of Sennisson & Stock, for forty thousand five hundred and eighteen dollars and twenty-eight cents; that fifteen thousand nine hundred and seventy-one dollars and nineteen cents of this sum, belonged to the plaintiff's firm as their proportion of the stock of goods thus sold; and that they have received but four thousand and seventy-eight dollars, leaving a balance of eleven thousand eight hundred and ninety-three dollars yet unpaid, for which they pray judgment.

The defendant excepted to the plaintiff's right to sue in this case, on the ground that other suits had been instituted, and were now pending by the said firm of Delpeuch & Co., for the same cause of action. The district judge overruled the exception.

The defendant pleaded the general issue, and averred that he had not received from his vendees, the money claimed by the plaintiff, and was not liable for the same in this action.

The evidence shows, that Delpeuch & Co., in August, 1830, shipped to the defendant at Tampico, for sale on their

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account, a quantity of merchandise, which, with others belonging to the defendant and one Canez, in the same month, were sold to Sennisson & Stock, merchants in Tampico, for forty thousand five hundred and eighteen dollars, and their notes taken on short time. The amount of Delpauch & Co's. interest in this sale, is alleged to be fifteen thousand nine hundred and seventy-one dollars, and a balance of eleven thousand eight hundred and ninety-three dollars, is shown to be yet due to them.

In October, 1831, Delpauch dissolved with Castelman, and in the articles of dissolution it was recited, that as Sennisson & Stock were indebted to Delpauch & Co., in the sum of eleven thousand eight hundred and ninety three dollars, on the goods sold to them by Dufart, it was agreed that Delpauch, who was charged with the liquidation of the partnership, should take this debt for eight thousand dollars, and to account if more was received, and allowed half of the deficiency if less.

It was shown, that a judgment had already been rendered against Castelman and Dufart, for four thousand dollars on this agreement.

Previous to the dissolution, Dufart rendered an account to Delpauch & Co., in which he says, "the sums which follow, remain to be collected for merchandise which I have sold on their account up to this time, and from which I am discharged;" and among the items or sums thus stated, is one of eleven thousand eight hundred and ninety-three dollars, due by Sennisson & Stock.

At the foot of the account, Dufart says, "it is through error that it is said in the account current, that Delpauch & Co. ought to be charged with the sum due by Sennisson & Stock. I am charged with the recovery, amounting to eleven thousand eight hundred and ninety-three dollars, &c., on which I am to have a commission, &c."

In March, 1832, Sennisson & Stock wrote to Dufart, then at New-Orleans, that they would be compelled to abandon the balance of the merchandise to him, which they had purchased, and which they did, accompanied by an invoice and

account, showing they still owed Dufart one thousand four hundred and seventy dollars. EASTERN DIST.
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It appeared from all the accounts, that in the return of the merchandise and credits for sales made, Dufart received in all, twenty-one thousand five hundred and seventy-nine dollars, from Sennisson & Stock. Delpuech claimed fifteen thousand nine hundred and seventy-one dollars originally, and his share on the sum received would be eight thousand four hundred and sixty-one dollars, of which he had already received four thousand and seventy-eight dollars, and has a judgment against Castelman and Dufart for four thousand dollars.

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The district judge gave judgment of non-suit. The plaintiff appealed.

Soulé, for the plaintiff, insisted on a reversal of the judgment, because the district judge admitted, that it is clearly proved there is a balance due to Delpuech & Co., of eleven thousand eight hundred and ninety-three dollars.

2. That Dufart is accountable for the goods and credits abandoned to him by Sennisson & Stock, inasmuch as he took them at his own risk. This matter has also been fully settled between Dufart and Sennisson, by a judgment, to which Dufart has submitted.

3. Admitting that Dufart is not bound to account for the credits transferred to him by Sennisson & Stock, until they are collected, he is accountable to Delpuech for his proportion of seventeen thousand five hundred and eighteen dollars, the amount of goods abandoned to him.

4. That under all the circumstances, Dufart having accepted the abandonment by Sennisson & Stock, and had the immediate control of the goods and credits thus transferred, from March, 1831, judgment should have been given, ordering him to account for the same to the plaintiff.

Canon, contra.

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Martin, J., delivered the opinion of the court.

The plaintiff being charged with the settlement of the affairs of the late firm of Delpauch & Co., consisting of himself and D. Castelman, as the sole and only members thereof, alleges, that said firm consigned to the defendant, residing at the time in Tampico, an adventure or parcel of merchandise, belonging partly to himself and partly to Canez, for an aggregate sum of forty thousand five hundred dollars, in which fifteen thousand nine hundred and seventy-one dollars and fourteen cents was included, being the amount of merchandise consigned by the said firm of Delpauch & Co.; that the defendant has accounted for only the sum of four thousand and seventy-eight dollars, which leaves a balance of eleven thousand and ninety-three dollars and ninety-seven cents, and interest, still unpaid and unaccounted for, for which the plaintiff has instituted this suit.

The answer of the defendant denies his accountability, and avers that he has never received payment from his vendees.

The District Court gave judgment of non-suit, and the plaintiff appealed.

The counsel for the plaintiff contends, that the judgment ought to be reversed, on the following grounds:

1. The balance claimed is admitted by the district judge, to have been established.

2. The defendant is accountable for certain goods and credits, which he received from his vendees, as he took them at his own risk; and the matter has been settled as it appears by a judgment in which he has acquiesced.

3. These goods and credits were received on the 31st of March, 1831, and the last balance of account between the defendant and his vendees, was struck in February, 1833; that it also appears the merchandise received was of the value of seventeen thousand five hundred and sixteen dollars and fifty cents, and the credits only amounted to three thousand four hundred and thirty-eight dollars. From this statement it results, that admitting all the goods received in February, 1833, had been re-sold in the defendant's hands,

he retains the sum of two thousand eight hundred and sixty-eight dollars, to cover such a deficiency as may result from the credits, and admitting further, that he cannot be accountable for those credits until he collects the amount of them; he is certainly accountable for the value of the merchandise, until he shows it has been lost without any fault of his.

4. The District Court should have compelled the defendant to account.

This court is of opinion, the District Court erred in nonsuiting the plaintiff, on the ground that he did not show the defendant had received any money by the sale of the merchandise, nor collected any of the debts. It was the duty of the defendant to establish, that this was the case without his fault.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the case be remanded for a new trial; the appellee paying costs in this court.

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POLICE JURY
VS.
MENARD.

In an action by the principal against his factor, to account and pay over a balance for merchandise sold on consignment, it devolves on the latter to show he has not received any money by the sale of the goods, or collected any of the debts, and to establish this to be the case *without his fault*, in order to avoid being liable.

POLICE JURY VS MENARD.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The certificate of the clerk, that the record contains "a true copy of all the proceedings, as well as of all the documents filed in the suit," is insufficient to enable the court to examine the case on its merits, and the appeal will be dismissed.

This is a hypothecary action against the third possessor. The police jury for the parish of Assumption, obtained a judgment against a surety of the sheriff of said parish, in

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POLICE JURY
vs.
MEYER.

1828, and on issuing execution it was returned, *no property found*. Suit was commenced against the defendant, to subject a tract of land which he had purchased from the surety, since the latter had become liable on his bond, on the ground, that a legal mortgage attached to all the property of the sureties to the sheriff's bond.

Judgment being rendered against the defendant, for the sum claimed with mortgage, after an unsuccessful attempt to obtain a new trial, he appealed.

On sending up the transcript, the clerk certified that it contained "a true copy of all the proceedings, as well as of all the documents filed in the suit."

A. Seghers, for the plaintiffs, moved to dismiss the appeal, on the ground that the certificate of the clerk, was insufficient to enable the court to try the case on its merits.

Nicholls, contra.

Martin, J., delivered the opinion of the court.

In this case a motion is made by the counsel of the appellees, to dismiss the appeal, on the ground of the insufficiency of the certificate attached to the record.

The certificate of the clerk, that the record contains "a true copy of all the proceedings as well as of all the documents filed in the suit," is insufficient to enable the court to examine the case on its merits, and the appeal will be dismissed.

The clerk attests that the transcript contains "a true copy of all the proceedings, as well as of all the documents filed in this suit."

This certificate is clearly insufficient; it does not negative the fact that oral evidence was given, nor that documentary evidence was produced which is not filed.

It is also clear, the certificate does not authorise this court to revise the judgment appealed from.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed with costs.

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BERLUCHAUX
vs.
BERLUCHAUX
ET ALS.

BERLUCHAUX vs. BERLUCHAUX ET ALS.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The mother or surviving parent, as tutor or tutrix, may refuse the administration of her minor children's property, yet retain the superintendence of them and the care of their education.

The person appointed to manage and administer minor's property, on the refusal of the natural tutrix to take that office, is termed a tutor *ad bona*; and this appointment may be made to minors of a person other than the natural tutrix, even when she is present and residing in the State.

A mother residing in a foreign state or country with her minor children, who inherit property in this, on coming here would be preferred to all others in obtaining the administration of their inheritance.

Where a surviving parent resides in a foreign state or country with his children who inherit property in this, he could, perhaps, on proof that he had complied with the laws of the country where he resided and had obtained full authority, as tutor, to administer his wards' property, appoint an attorney in fact to represent their interests, at least so far as to make partition of a succession held in common with co-heirs residing here.

The Spanish law having been in force in Louisiana, until the repealing act of 1828, the court will recognise it in relation to cases arising under the government of Spain, without requiring it to be proved as a fact.

According to the Spanish law, the tutorship of the mother is required to be conferred and confirmed by the judge in the same manner as of any other near relation on whom the office is cast by law.

The father may confer the tutorship of his legitimate children by will, which supersedes any appointment by the judge.

It is the duty of the relations of a minor, residing in this state, to provoke the appointment of a tutor, whether the minor be or be not domiciliated therein.

Where a minor resides in a foreign country and inherits property in this state, a tutor *ad bona* must be appointed to make partition or administer it.

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This is an action of partition. Pierre Berluchaux, the plaintiff, and Antoine and Joseph Berluchaux were the children of Charlotte Broyard, by her first marriage with Simon Berluchaux. She afterwards married V. Daublin, and died after her second husband, leaving in her will to her three children, among other dispositions, two lots of ground with the buildings thereon, and a slave in New-Orleans, which remains undivided. Joseph Berluchaux died since the will was admitted to probate, leaving a daughter, Amanda Berluchaux, his only child, residing with her mother in the Island of Cuba. The plaintiff is unwilling to hold this property in common with his co-heirs, and demands a partition by licitation or sale.

A dative tutor was appointed by the Probate Court of New-Orleans to represent the minor heir of Joseph Berluchaux, residing in Cuba. The testamentary executor of the widow Daublin, the dative tutor of Amanda Berluchaux and the other co-heir were duly cited.

The testamentary executor answered and consented to the sale and partition as requested, provided the proceedings were legal. The dative tutor answered, and averred he had been appointed by the advise and consent of an alleged family meeting, to represent said minor, while she still resided with her mother and guardian in Cuba; and that he is now advised his appointment is illegal and prays to be discharged.

Antoine Berluchaux in his answer declares he has no objection to the partition, but avers that the minor Amanda Berluchaux is not legally represented and was not so at the making of the inventory, as no tutor can be appointed to her in this state while she is under the guardianship of her mother; he prays that the appointment of the tutor to said minor be declared null and void; and that no further proceedings be had in the matter until she is duly represented.

The testamentary executor amended his answer and alleged the insufficiency of the appointment of a tutor to represent the minor, Amanda Berluchaux, and the nullity of all the proceedings under it. He stated also, that the mother of said minor, in her capacity of natural tutrix, had sent a power of

attorney to the tutor authorising him to act in her name and behalf in all matters concerning the succession falling to the heirs, but there is no evidence or authority accompanying said act to show she was authorised to act as tutrix of her daughter. He prays that a new appointment be made and the matter proceeded in *de novo*.

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A power of attorney from the mother in her capacity as tutrix of her minor, to the uncle who was appointed here, was produced duly certified, empowering said dative tutor to act in all matters touching the partition of the property.

The plaintiff took a rule on the dative tutor, to show cause why he should not give bond and security according to law, and proceed in his said capacity to make the partition required.

The judge of probates decided that although by the 268th article of the *La. Code*, the surviving wife is of right entitled to the tutorship of her minor children, yet according to article 271, she cannot be compelled to accept, and when she does, she is required to comply with certain formalities.

2. That in the present case it is not shown that the mother, residing under the government of Spain, has complied with any of the formalities required by law, to authorise her to act as tutrix; and that her assuming that quality in the power of attorney is not sufficient.

3. According to the article 946 of the *Code of Practice*, in case of absence from the state of the parent and minor, a tutor can be appointed to the latter, to assert and defend her interests. See also 3 *La. Rep.*: 484.

4. In the present J. Chaigneau, the uncle of said minor, has, with the advice of a family meeting, been appointed tutor by this court, and as such, is bound to qualify and give security as the law requires in such cases. The rule was made absolute.

The tutor appealed.

Soulé for the the tutor and appellant, contended that the appointment of the tutor in this case to represent the minor, Amanda Berluchaux, is illegal and void, as said minor resides

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2. The appointment of tutor being null, all the proceedings in taking the inventory preparatory to the partition, are illegal and void.

3 The power of attorney transmitted by the mother of said minor from Cuba, although it purports to be made in her capacity of tutrix, and authorises the tutor appointed here to act in all matters in behalf of the minor, concerning the succession inherited, is not accompanied by any authority showing said tutrix has been regularly appointed and confirmed in said office, and is therefore without effect.

Roselius for the plaintiff and appellee. There are two questions to be decided.

1. Can a dative tutor be legally appointed to a minor, residing with her mother under the government of Spain, when called to inherit property here, and to assist in a partition thereof?

2. Or, can the absent mother, while abroad, represent her minor as natural tutrix, without showing she has complied with the formalities of the law of her domicil, in being appointed and confirmed to said office?

3. We contend for the affirmative of these questions. By the positive provisions of our law and by the expositions thereof by this court, a dative tutor must be appointed to represent the absent minor, when inheriting property in this state. *La. Code, art. 1092. Code of Practice, 959. 3 La. Rep. 484.*

4. It will be also seen by those laws, that a curator or tutor *ad bona* cannot be legally appointed in this case. The tutor already appointed must act and proceed in the partition.

Mathews, J., delivered the opinion of the court.

This is a suit instituted to obtain a partition of certain property situated within the jurisdiction of the court below, which property cannot be divided and partaken in kind, and must consequently be subjected to a sale by licitation, &c.

A difficulty occurred in proceeding to partition, in the manner above stated, in consequence of one of the co-heirs or co-proprietors being a minor, residing out of the state and unrepresented in it. This minor, Amanda Berluchaux, resides with her mother, in St. Jago de Cuba, a place under the government of the laws of Spain. The mother being the surviving parent, according to our law, is natural tutrix, and as such has a right to the guardianship of her children and to assume the management and administration of their property; but she is not bound to accept of this office. Although she may refuse it, still she retains the superintendence of them and the care of their education. A tutor whom she may have caused to be appointed, on her refusal to take that office, in such a case, is merely entrusted with what concerns the administration of their property. *La. Code, art. 268 and 271.*

In pursuance of these provisions of law, it is evident that a tutor *ad bona* may be appointed to a minor, other than the natural tutrix, even when she is present and residing in the state. A mother residing in a foreign state or country with her children, who inherit property in this, on coming here and making application to the proper authority for that purpose, would be preferred to all others in obtaining the administration of the property thus inherited; or, perhaps, on proof to the tribunal of this state, in a case like the present, which relates only to the partition of a succession held in common with others by her minor child, that she had taken all steps necessary to give her full authority as tutrix, in relation to the property of her pupil, according to the laws of the place of their residence, she might appoint an attorney in fact, to represent their interests here; but no proof of this nature is adduced in the present instance.

We have said that the minor who is interested in the partition of property, claimed in the present case, resides with her mother in a place governed by Spanish law. Now, although that law has no longer any force in the state of Louisiana, since the repealing act of 1828, yet having been considered previously the law of this country, so far as it was not abrogated or altered by our statutory enactments, we may still,

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The mother or surviving parent as tutor or tutrix may refuse the administration of her minor children's property, yet retain the superintendence of them and the care of their education.

The person appointed to manage and administer minors' property, on the refusal of the natural tutrix to take that office, is termed a tutor *ad bona*; and this appointment may be made to minors, of a person other than the natural tutrix, even when she is present and residing in the state.

A mother residing in a foreign state or country, with her minor children who inherit property in this, on coming here would be preferred to all others, in obtaining the administration of their inheritance.

Where a surviving parent resides in a foreign state or country, with his children who inherit property in this, he could, perhaps, on proof that he had complied with the laws of the country where he re-

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sided, and had obtained full authority as tutor, to administer his wards' property, appoint an attorney in fact to represent their interests at least so far as to make partition of a succession, held in common with co-heirs residing here.

The Spanish law having been in force in Louisiana, until the repealing act of 1828, the court will recognise it in relation to cases arising under the government of Spain, without requiring it to be proved as a fact.

According to the Spanish law, the tutorship of the mother is required to be conferred and confirmed by the judge, in the same manner as of any other near relation on whom the office is cast by law.

The father may confer the tutorship of his legitimate children by will, which supersedes any appointment by the judge.

It is the duty of the relations of a minor, residing in this state, to provoke the appointment of a

without violation of the rule which requires foreign laws to be proved as facts, assume some knowledge of it. According to this law tutorship is of three kinds only : Testamentary, by effect of law, or *legitima* and dative. The right of tutorship granted to a mother comes under the denomination of *tutela legitima*, and she is to be preferred in the order of relationship before all others, when the father has not provided by will a tutor for his children. *Febrero Novisimo*, vol. 1, Nos. 7 and 10. Thus the tutorship conferred on a mother by this law is granted in the same manner as that which is given to the nearest relation, and it is made the duty of the judge to confer and confirm the tutorship of a mother as of any other near relation, on whom the office is thrown by law, and tutors of this class can do no act, without this confirmation, which will be valid in relation to the administration of the property of their pupils, unless when the tutorship is conferred by the testament of a father on his legitimate children. *Same authority*, No 15.

The attempt therefore of the mother, in the present instance to appoint an attorney in fact, to act for her in relation to the interests of her daughter, must be considered as without effect ; because there is no evidence of confirmation of the tutorship of the former by any competent tribunal in the place where they reside.

Considering the minor as wholly unrepresented in this state in relation to the administration of her property, the next inquiry is how this defect is to be supplied in pursuance of our laws on the subject. It is admitted on both sides, that a tutor must be appointed by authority of the competent judge, and one was appointed under all the formalities required to constitute a dative tutor *ad bona*. This appointment is complained of as illegal ; and in opposition to it, the counsel contends that a tutor *ad hoc* only could be appointed according to the provisions of the 295th article of the La. Code. That article is found in the section which treats of dative tutorship, and has relation to minors, both those who may have no domicile in the state and those who have. It is, however, made the duty of the relations of the minor, residing

in the state, to provoke the appointment of a tutor, whether such minor be or be not domiciliated therein. In the present instance the appointment of a tutor *ad bona* has been provoked, and we are of opinion that this appointment is supported by the art. 1092 of the La. Code, and art. 946 of the Code of Practice. Consequently there is no necessity of appointing a tutor *ad hoc*.

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tutor, whether the minor be or be not domiciliated therein.

Where a minor resides in a foreign country, and inherits property in this state, a tutor *ad bona* must be appointed to make partition or administer it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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ON A PETITION FOR A RE-HEARING.

It is a general principle, admitted by the comity of nations, that the tutor, of a minor, deriving his authority from the law of their common domicil, has a right to exercise the actions of his pupil every where.

The law 9, tit, 16, *Partida* 6, adopts the system of the Roman law in the 118th novel of Justinian, requiring the mother who accepts the tutorship of her children, other than that conferred by testament, to give security.

This case comes before the court, in this instance, on an application for a re-hearing. See the decision of the case, ante 539.

Soulé, for the tutor and appellant, applied for a re-hearing, on the following grounds :

1. In this case the minor to whom a tutor has been appointed, resides with her mother, in the dominions of Spain, where natural tutorship is governed by the same principles as those which prevail in Louisiana.

2. By our laws, the tutorship of minor children belongs of right to the surviving parent, as *natural tutor* ; it takes place

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as a matter of right, without being confirmed by the judge.
La. Code, art. 265, 268.

3. A minor having a mother living, cannot be subject, as regards his person and property, to the power and authority of any other person than that of her mother, unless she has been deprived of her right of tutorship, or has expressly renounced it.

4. In the present case, the appointment of a permanent and unqualified tutor, has the effect to deprive the mother of the tutorship; if his functions are only temporary and limited to the particular object for which they were conferred, it is only a *special* tutorship, which may exist simultaneously with natural tutorship.

5. The court seems to recognise in its decree, that the mother, on coming here, could claim the tutorship, which is admitting it to be special as conferred here, and which the court has thought proper to qualify, by terming him tutor *ad bona*.

6. Our jurisprudence, modified as it is by the act of 1830, no longer recognises even curators *ad bona*: that law has respected curators *ad hoc* and tutors *ad hoc*, but it has introduced nothing in our system that might apprise us of a tutor *ad bona*. Such a tutor is unknown to our jurisprudence.

7. Any tutorship, other than that which must exist in all cases over the minor, is essentially special and limited to the the particular case that gave rise to it, and in the strictest sense is a tutorship *ad hoc*.

8. The principle is generally recognised, that the authority of the tutor cannot extend and be exercised beyond the limits of the country of his appointment, except as regards the personal rights of the minor; but the law of the place where it is situated must govern in regard to immoveable property.

9. It is true the code provides that a tutor, *conformably to law*, shall be appointed to the absent minor, when the father and mother reside out of the state, and when an inheritance is to be administered. *La. Code, 1092.*

10. The text of this article points out a direct reference to other provisions, and by recurring to article 295, we see what

kind of tutor must be appointed in the present case. But one absolute tutor can exist; all others are special, as tutors *ad hoc*.

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11. In France, a *pro-tutor* is appointed whenever a minor has property situated elsewhere than in the country of his domicile. *Merlin, Toullier, Sirey, Duranton, Paillet*, all recognise in the functions of this *pro-tutor*, those of a *special* one. By the Roman law, a special tutor was appointed to represent the minor in particular cases, when his absolute tutor could not act.

12. In this case the appointment of tutor is only special. Who could dispute the mother's right, when duly recognised as tutrix, according to the laws of Spain, to come here and claim the personal rights and actions of her minor daughter, or the proceeds of the property sold here? As soon as she has complied with the formalities of our laws, she can sue and recover in the name of her minor child, the debts due to her in this state, which will render the tutor's functions ineffectual or purely temporary and special.

Bullard, J., delivered the opinion of the court.

The court has given to the petition for a re-hearing in this case, a deliberate consideration, and now proceeds to state the reasons why its first judgment should not be disturbed.

We do not hesitate to avow that our first impressions were strongly in accordance with the views of the counsel for the appellant. It seems well settled, and the principle is not controverted by this court, that the tutor of a minor deriving his authority from the law of their common domicile, has a right to exercise the actions of his pupil every where. The comity of nations recognises the validity of such an authority. Such is the doctrine taught by most of the continental writers, cited by Judge Story, in his work on the Conflict of Laws, to which our attention has been called, and which we often consult with pleasure and with profit. The first question, therefore, which presents itself, is one of fact: has Amanda Berluchaux a tutor, recognised as such by the laws of Spain? If so, she may be properly represented by him in the action

It is a general principle admitted by the comity of nations, that the tutor of a minor, deriving his authority from the law of their common domicile, has a right to exercise the actions of his pupil every where.

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of partition now pending. In deciding on this question, we thought ourselves authorised to proceed upon that knowledge of the laws of Spain, which we derive from the fact that Louisiana was long governed by the same system, as was done in two cases reported in 1 *La. Rep.* 255 and 542.

The counsel assumes as a fact, that natural tutorship is governed in Spain by the same principles as those adopted in this state, that it takes place of right, without the necessity of being confirmed, and that those same principles are recognised by the Spanish as well as Roman jurisprudence.

This confident assertion has induced us to examine again those parts of the Spanish law which relate to this subject, lest we may have been mistaken in supposing, as we did in the opinion first pronounced, that the tutorship conferred on the mother is merely legal, and requires an express judicial recognition and confirmation. In the result of this second investigation we think we cannot be mistaken. It is incontestible, that the mother's right to the tutorship of her children was unknown to the jurisprudence of Rome, until the promulgation of the 118th novel of Justinian. The tutorship is conferred on her by that novel, as the nearest relation, when the father has appointed no tutor, by will, but always under the express condition that she shall renounce the right of contracting a second marriage, and the benefit of the *senatus consultum velleianum*. On making these renunciations, she shall be preferred, says the novel, to all the collaterals, except the tutor appointed by the testament of the father. 118th Novel, chap. 5.

The law 9, tit. 16, Partida 6, adopts the system of the Roman law, in the 118th Novel of Justinian, requiring the mother who accepts the tutorship of her children, other than that conferred by testament, to give security.

The 9th law, 16th title of the 6th Partida, adopted the system of the novel, and requires the mother who accepts the tutorship of her children, other than that conferred by the testament of the father, to give security. In addition to the authorities referred to in our first opinion, to establish the character and requisites of this species of tutorship, we might rely on the opinion of Gomez, in *Legis Tauri*, 14th law, No. 10, et seq.

Febrero, whose authority will hardly be questioned, so far from regarding the tutorship of the mother as natural, in our legal sense of the term, treats it expressly as anomalous, irregular and extraordinary. 1 *Feb. Novisimo*, 148, No. 11.

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With such views of the laws of Spain, we thought that the execution of a power of attorney, before the American consul at St Jago de Cuba, by the mother, assuming the quality of guardian or tutrix to her minor children, did not alone furnish sufficient evidence of her capacity as such.

That question being disposed of, it only remains to inquire whether the most proper appointment to be made by the court, was of a tutor *ad bona*, generally, or a tutor *ad hoc*. On this subject, the counsel is pleased to remark that, "our jurisprudence, modified as it has been by the law of 1830, recognises no more curators *ad bona*; that law has respected curators *ad hoc*, tutors *ad hoc*, but it has introduced nothing in our system of laws, that might apprise us of the existence of a tutor *ad bona*. Such a tutor is unknown to any jurisprudence."

The court is not sensible of meriting the compliment of having enriched our jurisprudence with a new principle, or our legal language with a new term. Neither the thing nor the name is original with the court. *The Code of Practice*, article 946 provides that "if the father and mother of the minor reside out of the state, and are not represented in it, and the minor be also absent, he may be provided with a tutor, by the judge of probates of the place where his principal property is, or where he has interests to assert or defend." It is true, the tutor in such a case, is not expressly called tutor *ad bona*, but it is clear the tutorship is limited, and cannot extend to the person of the pupil, because he is presumed to be under the paternal power, and the duties of such a tutor are confined, necessarily, to the property and interests of the minor. Perhaps a better translation could not be made into Latin, than to say at once, without paraphrase, he would be a tutor *ad bona*. By the 271st article of the Civil Code, it is declared that when the mother refuses the tutorship, she still retains the superintendence of her chil-

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dren, and the care of their education. The tutor, in such a case, is merely entrusted with what concerns the administration of their property. This is, most emphatically, a tutorship *ad bona*, although not so expressed. But the article 1092 of the La. Code, speaks pointedly of tutors and curators *ad bona*.

In short, it appears to us to result from all the provisions of our law, on this subject, that the legislature intended to provide more ample guards and guarantees for the protection of the interests of absent minors, than could be expected from the mere appointment of a nominal tutor *ad hoc*, in a particular suit, whose duties would necessarily terminate with the suit, and who, in this particular case, would be, perhaps, without authority to receive the share coming to the minor, after the partition should have been effected, and who gives no security for the delivery of it to the party interested. It is true, these provisions do not prevent persons having claims against a minor or absent person, from pursuing the same, previous to the appointment of a tutor or curator; but in such cases, the absentee may be represented in the suit by a curator or tutor *ad hoc*. *Code of Practice, art 964*. It is, however, the duty of the relations of a minor, to provoke the appointment of a tutor, either with full power, as such, over the person and property, or in a more restricted sense of the word, but always under some alternate legal responsibility towards his pupil.

The re-hearing, for these reasons, is refused.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In an absolute or defeasible sale, the property does not pass from the vendor with regard to third persons, until tradition takes place; but before the tradition the vendee has *jus ad rem*, though not *in re*.

So where a bill of sale is taken on a steam-boat, to secure the payment of a sum of money, executed between the parties in the state of Tennessee, and registered in a court there, and the boat is afterwards brought to this state, and sold by the syndic of the creditors of the owner, who becomes insolvent: *Held*, that the bill of sale is valid although defeasible, on payment of the money; and that the sale by the syndic changed the remedy, without affecting the vendee's right, who is still entitled to the proceeds.

On the 2d March, 1831, the plaintiff made a surrender of his property to his creditors, which was accepted, and J. Leeds appointed syndic. Among the articles surrendered, was the steam-boat Red Rover, valued in the schedule at six thousand dollars.

After selling the property surrendered, the syndic filed a tableau of distribution on the 26th March, 1826.

On the 2d April following, Joseph Hurst, a judgment creditor of the insolvent, for materials furnished and labor done, on the steamer Red Rover in Tennessee, before she made her voyage to New-Orleans, amounting to six hundred and sixty-three dollars, made opposition to the tableau, and claimed to be put on it as a privileged creditor, on the proceeds of the steam-boat. His judgment was obtained on an attachment against the boat, after her arrival in this state, which was duly recorded.

On the 6th of April, Baxter & Hicks filed their petition to the tableau, alleging various grounds of opposition, on the score of informalities &c. in it; and also claimed to be

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The petitioners annexed to their opposition a bill of sale, executed by the insolvent to them, in the state of Tennessee, where the steam-boat was built. It was recorded in the county court of one of the counties in that state, and stipulated a sale of the steam-boat to the vendees, but defeasible on the payment of the sum mentioned therein, conditioned also that the boat should not leave the state, until the money was paid.

Leeds, the syndic, was also placed on the tableau as a creditor, for six hundred and sixteen dollars and seventy-three cents, for boilers, castings, &c., furnished said boat.

On the final hearing of these oppositions, the claims were allowed respectively, but Baxter & Hicks were ordered to be placed on the tableau, and be paid in preference to *Leeds* and *Hurst*. They appealed.

Lockett and M^cCaleb, for the appellants, contended that the judgment should be reversed, because the mortgage under which Baxter & Hicks claim the preference over other creditors, was never recorded, at least there is no proof of it, and if it had been, it could only have effect against third persons, from the date of its registry.

2. The mortgage being the only ground on which the preference was given to Baxter & Hicks, and this it seems is evidently insufficient, the decision of the District Court is therefore clearly erroneous, and must be reversed.

Hennen, for Baxter & Hicks, the appellees, made the following points.

1. We claim a privilege on the proceeds, under a bill of sale of the steam-boat, which was duly recorded and enregistered in one of the courts in Tennessee, where the boat then was, and where she was to remain, until the contract between the parties was fulfilled.

This bill of sale is absolute, but with the condition that if the *sum due* Baxter & Hicks should be paid, then a re-

conveyance would be made. This deed was not required to be registered in Louisiana, as the boat was to remain in Tennessee. It was a fraud in bringing her away.

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3. Baxter & Hicks had commenced suit, and were proceeding to judgment, when Garritson surrendered his property. They could have enforced their rights against the boat, in virtue of their mortgage, if they had not been compelled to cumulate their suit with the *concurso* of creditors. They have now a privilege on the proceeds of the sale of the boat.

Martin, J., delivered the opinion of the court.

The syndic is appellant from a judgment, by which he is ordered to pay to an intervening party, the proceeds of the sale of a steam-boat, part of the property surrendered by the insolvent.

The judgment is complained of, on the ground that the mortgage under which a privilege is claimed, was never recorded, and if it had been it could have no effect against third persons, except from the date of the registry.

The counsel of the appellee urges, they claim under a bill of sale of the boat, the proceeds of the sale of which are now in the hands of the appellant. The bill of sale appears to have been registered in a court of the state of Tennessee, within the jurisdiction of which the sale was made, and the boat was to remain in that state, by the terms of the contract. The sale is indeed defeasible on the payment of a sum of money. The insolvent was guilty of fraud in taking the boat, in violation of his contract, out of the state of Tennessee, and bringing her to New-Orleans.

It does not appear to us, that the instrument under which the proceeds of the boat are claimed, had any other object than, to secure the payment of a sum of money; but the parties chose to give to their contract the form of a defeasible sale, and we cannot consider it in any other light. It is true that in an absolute or defeasible sale, the property does not pass from the vendor, with regard to third parties, till tradition takes place. *Traditionibus non nudis pactis dominia*

In an absolute or defeasible sale, the property does not pass from the vendor with regard to third persons, until tradition takes place; but before the tradition, the vendee has *jus ad rem* though not *in re*.

So where a bill of sale is taken on a steam-boat, to secure the payment of a sum of money, executed between the parties in the state of Tennessee, and registered in a court there, and the boat is afterwards brought to this state, and sold by the syndic of the creditors of the owner.

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or who becomes insolvent: *Held*, that the bill of sale is valid, although defeasible on payment of the money; and that the sale by the syndie changed the remedy, without affecting the vendee's right, who is still entitled to the proceeds.

rerum transferentur. But before tradition the vendee has *jus ad rem*, though not *in re*. This right the vendee began to exercise by a suit against the insolvent, before the cession, which was cumulated with the proceedings in the *concurso*. The plaintiff, if his suit had been suffered to be proceeded in to judgment, must have recovered the boat *rem ipsam*.

The sale by the syndic has changed the *remedy*, without affecting the *right*. Since the boat cannot now be recovered, the plaintiff was entitled to what represents her, *i. e.*, the proceeds of the sale, and we do not think the District Court erred in decreeing them to be paid to him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

In an action of mortgage based on an account and debt, which is shown to be grossly erroneous in its calculations and amount, the debt will be set aside for adjustment, and the contract of mortgage annulled and cancelled as being made in error.

This is an action of mortgage, to compel the payment of three thousand two hundred dollars, due as the first instalment of a debt of nineteen thousand four hundred and fifty dollars, acknowledged by the defendant.

The plaintiff alleges, that the above sum is the amount found due on a settlement between him and the defendant, as his curator *ad bona*, payable by instalments of three thousand two hundred dollars each, and secured by a special mortgage

on a valuable tract of land in West Baton Rouge. The first instalment having become due and remaining unpaid, he prays judgment for the amount, and that the mortgaged premises be seized and sold to satisfy the same.

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The defendant denies that he is indebted in the manner and form, or to the amount as alleged, and avers the contract or settlement of account between them, was made through error of law and fact, and should be annulled; and the mortgage being merely accessory to the debt, is null and void, and ought to be cancelled. He further states, that his account as curator *ad bona*, was agreed to be referred to a person versed in such matters, and stated according to law; that in stating it, he is illegally charged with interest upon interest, at ten per cent. per annum, which charges are about eleven thousand six hundred and forty-five dollars more than is really due: and that he signed said account through error, supposing it to be correct at the time; he therefore prays that the act of settlement or the contract, and mortgage sued on, be declared null and void.

The act of settlement, as well as that of the mortgage, were introduced in evidence, and the testimony of the notary who drew up the acts and stated the account, was taken down. From this testimony, and the bare inspection of the account, the district judge who tried the case, detected the illegal items and charges, substantially as alleged.

Judgment was rendered, declaring the account as stated, and the mortgage executed by the defendant, null and void; reserving to the plaintiff his legal rights against the defendant, as his curator *ad bona*, on a legal and just settlement of their accounts. The plaintiff appealed.

Nicholls, for the plaintiff, contended that the error alleged was not proved, as appeared by the testimony of the notary who drew up the act of settlement. But if error had been proved, it should have been corrected by the court, and judgment given for the sum actually due.

2. The manner of calculating interest was not illegal; it was calculated by the appellee himself, who agreed to pay at that rate.

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3. The account stated and drawn up by the notary, must be considered in law, as made by the defendant, whose agent he was. *Qui facit per alium, facit per se.*

4. He who seeks justice, says the judge *a quo*, must himself be just. The court applied this maxim, exclusively for the benefit of the defendant, in correcting the errors to his disadvantage, if any existed, and refuses to allow the plaintiff that which is acknowledged to be due. In this respect also the judgment is erroneous.

5. The rendition of the account being followed by a solemn notarial act, is binding on the defendant, to pay the interest stipulated therein.

6. The District Court erred in vacating the act of mortgage, given as security for this claim, as the plaintiff relinquished a better security, which should not be affected by an error of calculation in the account.

7. The notarial act of settlement was in the nature of a compromise, by which the plaintiff relinquished one thousand dollars, as admitted since by the defendant.

Conrad, for the defendant, showed there was gross error in the settlement of accounts, which requires the defendant to pay more than twice as much as was actually due. It cannot be presumed he intended to benefit the plaintiff that amount. *Nemo presumitur donare.*

2. The defendant must have supposed he was bound to pay compound interest, at the rate of ten per cent. per annum, or he would not have signed; in that case it is an error of law, bearing on an essential part of the agreement, and is null. *La. Code, 1840.*

3. It was an error of calculation or ignorance of the fact, that compound interest was charged. Error in this respect vitiates the contract. *La. Code, 1815.*

4. This is a case clearly of exorbitant usury. Not only is a higher rate of interest charged than the curator was bound to pay, but interest on that interest is charged, all of which is prohibited. *Civil Code, p. 70, art. 71. La. Code, art. 1934.*

J. Seghers, on the same side, contended, that the contract was manifestly erroneous, and null and void. Tutors were not bound under the old Code, which must govern in this case, to pay compound interest. Under the *La. Code*, tutors are only bound to pay an interest of five per cent. on the revenues, when they exceed five hundred dollars, after deducting ten per cent. for commissions. *La. Code*, 341-2. 1 *Moreau's Digest*, 225. 5 *La. Reports*, 489, 490.

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2. The agreement entered into between the parties, took place under the *La. Code*, which prohibits interest on interest to be taken, and no stipulation to that effect is valid. *La. Code*, 1934.

3. The defendant was laboring under an error of fact and of law, from which he should be relieved. *La. Code*, art. 1815-16, 1840, 2129.

4. Error in law vitiates a contract, when such error is its only or principal cause. *La. Code*, 1840. 5 *Toullier, l'Erreur de Droit*, No. 58 et suivans.

Mathews, J., delivered the opinion of the court.

This suit is based on a contract of mortgage, wherein the defendant acknowledges to owe to the plaintiff, the sum of nineteen thousand four hundred and fifty dollars eighty-five cents, which he promised to pay by annual instalments of three thousand two hundred and fifty dollars, seventeen cents. The debt purports to have arisen in consequence of the acts of the defendant, as curator *ad bona* of the plaintiff, and was stated to the amount stipulated in the act of mortgage, as a result of calculations of interest on certain sums of money which came into the hands of the curator. These calculations originated in a settlement of accounts between him and his ward, after the latter arrived at the age of majority, and were made by a person to whom the accounts had been submitted for adjustment, by the curator. The court below considering the calculations made by the referee, as grossly erroneous, and prejudicial to the defendant to a very large amount, rendered judgment in his favor, by which the account as adjusted, was set aside, and the contract of mortgage,

EASTERN DIST. *a sequence of it, was annulled; and from this the plaintiff February, 1835.* appealed.

**TRUDEAU
vs.
MATHIEU.**

In an action of mortgage based on an account and debt, which is shown to be grossly erroneous in its calculations and amount, the debt will be set aside for adjustment, and the contract of mortgage annulled as being made in error.

The calculations of the referee are shown by the evidence of the case, to be illegal and erroneous, both in relation to the rate of interest assumed, and the manner in which it was compounded for a number of years, producing a result egregiously wrong, and prejudicial to the defendant, probably to more than one half of the sum stated against him.

The error complained of in this transaction, is so evident and so gross, as in our opinion, clearly to authorise the judgment of the court below. That court might perhaps, after setting aside the account rendered, and annulling the act of mortgage, have proceeded to adjust the accounts of the curator, and rendered judgment for the sum which should appear to be justly due to the plaintiff. But the pleadings of the case do not require a proceeding of this kind, consequently, not having taken this step, is no ground of error in the judgment as pronounced.

The parties may hereafter adjust their differences amicably, or if this cannot be effected, the courts of justice remain open to the plaintiff, in which he may prosecute his claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.
February, 1835.

SAULET
vs.
GIRARD.

SAULET vs. GIRARD.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF JEFFERSON.

The act of the 11th March, 1830, abolishing the office of curator *ad bona et ad litem* to minors, does not apply in cases where curators were appointed before the promulgation of the act. If the first curator is removed, another must be appointed, although since the general law abolishing the office.

The plaintiff having been appointed curator *ad bona* to the minors Foucher, applied to the Court of Probates, to be discharged, and that a tutor and under tutor be appointed to said minors.

It appeared by a statement of facts admitted, that A. Foucher, jr., was appointed curator *ad bona* of the minors Foucher, the 26th January, 1830, and regularly removed from said office, in December, 1834, and the plaintiff nominated as curator *ad bona* in his place.

The judge of probates decided, that Foucher having been appointed before the passage of the act of the 11th March, 1830, abolishing the office of curators to minors, by the proviso in the 9th section of said act, that law is not applicable to a case like the present. Judgment was rendered, maintaining the plaintiff in his appointment, from which he appealed.

Pichot, for the plaintiff, contended, that the judgment of the Probate Court was erroneous, because by the 9th section of the act of the 11th March, 1830, there shall hereafter be no curator *ad bona* or *ad litem* appointed to minors.

2. That although by the proviso in the 9th section of said act, this law shall not apply to cases, in which curators *ad bona* shall have been appointed previous to its promulgation, yet this proviso cannot be so construed, as to suppose that

EASTERN DIST.
February, 1835.

SAULET
VS.
GIRARD.

curators may be now appointed, but that only those in office at the time, were to be maintained until it became vacant.

3. The legislature having in 1828 passed a law, that minors should remain under the authority of their tutors, until they obtained the age of majority, it became necessary to abolish the office of curator *ad bona* and *ad litem*, to make the system harmonise with the civil law, the office therefore no longer exists, since 1830.

4. By reference to the articles of the Code which treat of tutorship and curatorship, it will be seen that the alteration was made in the law, for the greater security of minors; so that in this case, the minors Foucher should have the benefit of it.

Rost, contra.

Bullard, J., delivered the opinion of the court.

The statement of facts in this case, shows that A. Foucher, jr. was regularly appointed curator *ad bona* of his minor children, before the promulgation of the act of the 11th March, 1830, entitled "an act in addition to the laws now in force, relative to tutors and curators of minors;" that in December, 1834, he was regularly deprived of the curatorship, and that François Saulet was thenceforth appointed curator *ad bona* of the children, in the manner and form required by law for the appointment of such curators, before the passage of that act. The question therefore which the case presents, is whether this last appointment was regular and legal.

The act of the 11th March, 1830, abolishing the office of curator, *ad bona* and *ad litem* to minors, does not apply in cases where curators were appointed before the promulgation of the act. If the first curator is removed, another must be appointed, although since the general law abolishing the office.

The 9th section of the act declares, that there shall hereafter be no curator *ad bona* or curator *ad litem* appointed in any case, but that the persons and estates of minors shall in all cases, be placed under the power of tutors and undertutors, &c. The proviso to this section, out of which the controversy has arisen, is in the following words: "provided that this section shall not apply to cases, in which curators *ad bona* shall have been appointed, before the promulgation of this act."

This proviso applies to the whole section ; as well to that part, which abolishes the trust of curator *ad bona*, as to that which provides for the appointment of tutors and under tutors. Surely then it cannot be said that this statute authorises the appointment of a tutor to minors, who were already provided with curators *ad bona*, before its promulgation. If the section stood without the proviso, then indeed it would authorise the appointment of a tutor and under tutor, in this case. The construction contended for by the appellant, would leave the proviso without effect. But we are bound, if possible, to give it some effect, if susceptible of it. This can only be done by supposing that the legislature intended that such minors, as were at the promulgation of the act provided with curators *ad bona*, should continue under that species of guardianship until their age of majority, and that the change of system should not apply to them. With respect to them, the trust of curator *ad bona*, as established by the Code, still exists, because it is declared that as to their case, this section shall not apply. As to them, we are therefore bound to consider it as unwritten, for it appears to us clear, that it does not authorise the appointment of a tutor and under tutor. We are, therefore, of opinion, that the Probate Court did not err in maintaining the appointment of a curator *ad bona*.

EASTERN DIST.
February, 1855.

SAULET
VS.
GIRARD.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

EASTERN DIST.
February, 1835.

FAGOT ET ALS.
vs.
PORCHE.

FAGOT ET ALS. vs. PORCHE.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Evidence of a claim in compensation and re-convention, will be rejected, when the demand is not equally liquidated with the claim of the plaintiff.

The liquidation of a partnership claim, cannot be pleaded in compensation or re-convention, against a demand on a note of hand.

The absence of all connection between two demands, is an insurmountable objection and obstacle to a demand in compensation or re-convention.

This is an action on two promissory notes, executed by the defendant in favor of Pierre Caseaux, deceased, the ancestor of the plaintiffs. Fagot sues as tutor of his children, who are minor heirs of the deceased, claiming the amount of said notes, which together make the sum of five hundred and twenty dollars ninety-one cents; that one of them, for four hundred and thirty-two dollars ninety-one cents, is secured by a mortgage on a slave, which he prays may be seized and sold to pay said sum.

The defendant pleaded a general denial, and set up a large claim, amounting to one thousand seven hundred and twenty-two dollars, in re-convention against the plaintiffs, as due by their ancestor, for the purchase, advances and increased value of a plantation, which he alleges he owned in partnership with the said P. Caseaux, in his life-time, and which his said heirs, the plaintiffs, have caused to be sold as a part of his succession.

On the trial, the district judge rejected the testimony of the defendant, offered in support of his re-conventional demand, on the ground that the claim was not liquidated, and was not connected with, or incidental to the demand of the plaintiffs. The defendant's counsel excepted to the opinion of the court, rejecting the evidence.

Judgment was given in favor of the plaintiffs, for the amount of their claim. The defendant appealed.

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February, 1835.

FAGOT ET AL.
VS.
PORCHÉ.

Nicholls, for the appellant, insisted the court erred, in rejecting testimony to establish the plea in compensation. Compensation takes place of right between two debts, having for their object a sum of money, and equally liquidated and demandable. *La. Code*, 2205.

2. To establish this right of compensation, it is necessary to show, first, that the claim is for a sum of money; second, that it be equally liquidated with the one to which it is opposed, and third, that it be equally demandable.

3. The document offered as testimony to support the plea, is an account rendered by the ancestor of the plaintiffs, to whom the notes sued on were given, in which he acknowledges the plantation to be partnership property, debits defendant with the amount of the purchase money, expenses of the crop, negro hire, and strikes a balance in his own favor. The account is signed by both parties, and is an acknowledgment on the part of Caseaux that half of the plantation is the property of the defendant.

4. Under these circumstances, the latter is entitled to the money he has paid, as the heirs have had the plantation sold. This then, is a claim for a *sum of money* due, which establishes the first part of the plea in compensation.

5. The claim is equally liquidated, for the sum claimed on account of the plantation is specified in the account offered in evidence.

The claim of the defendant is equally demandable with that sued on. The interest in the plantation belonging to the defendant, has been received by the plaintiffs, in having it sold as part of the succession of their ancestor. The sum due for this interest, is specified in the account offered in evidence, and more than compensating the sum sued for.

Martin, J., delivered the opinion of the court.

The defendant being sued on two promissory notes, executed in favor of the ancestor of the plaintiffs, pleaded

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February, 1835.

FAGOT ET AL.
VS.
FORCHER.

the general issue, and set up a claim in compensation and re-convention, for a much larger sum than that for which the notes sued on were given. Judgment was rendered in favor of the plaintiffs, and disregarding the defendant's claim, from which he appealed.

His counsel complains in this court, that the judge *a quo*, rejected written and parole evidence offered by him, in support of the claims pleaded in compensation and re-convention. These claims were grounded on the allegation, that the plaintiffs' ancestor, and who was the payee of the notes sued on, took in his own name, the title to the plantation which he and the defendant had bought in partnership, and the defendant advanced a large sum towards the purchase, and made great advances for the cultivation and improvement of the land; that at the death of the plaintiffs' ancestor, his heirs possessed themselves of the land, which has since been sold as part of the succession. The defendant also avers, he has a further and large claim, on the score of the increased value of the land since the purchase.

Evidence of a claim in compensation and re-convention will be rejected, when the demand is not equally liquidated with the claim of the plaintiff.

The liquidation of a partnership claim, cannot be pleaded in compensation or re-convention, against a demand on a note of hand.

The absence of all connection between two demands, is an insurmountable objection and obstacle to a demand in compensation and re-convention.

The introduction of the evidence was rejected, on the ground that the defendant's claim was not equally liquidated with that of the plaintiffs, and was absolutely unconnected therewith.

It appears to us, the decision of the District Court was correct. The liquidation of a partnership concern, such as that now sought, is universally a much more tedious operation, than that which is required to ascertain the validity of a claim of the payee of a note of hand. The liquidation of the claim of the defendant, could not well be asked from a plaintiff, whose claim was already liquidated by the defendant, before he subscribed the note. There was no room for compensation.

The absence of all kind of connection between two claims, is an insurmountable obstacle to a demand in compensation or re-convention.

The plea of re-convention is unsupported.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.
February, 1895.

HILLIGSBERG
vs.
HOLMES.

HILLIGSBERG vs. HOLMES.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The defendant, in an execution, is subject to no interest, simple or compound, after the adjudication of his property, whether on credit or for cash.

In a sale of property, under execution, on twelve month's credit, the purchaser is required to give bond for the whole amount of principal, interest and costs due on the day of sale, as if made for cash; and on that aggregate sum, the same rate of interest is allowed in the bond, as that on the original debt, from the day of sale.

When the judgment of the court *a quo* is amended, on appeal, although both parties asked and obtained an alteration, the appellee will be required to pay costs in both courts.

The plaintiff alleges that he sold a lot of ground, in the city of New-Orleans, on the first of November, 1828, to one P. S. Hamblet, for two thousand, one hundred dollars, payable by instalments of seven hundred dollars each, in one, two and three years from the date of the sale, with interest at the rate of ten per cent. per annum, from the times when said notes respectively became due, if not punctually paid, until final payment, together with a mortgage retained on the property, to secure the payment of the price thereof.

The two last notes being unpaid after becoming due, and the purchaser having died in the mean time, but leaving an heir, the plaintiff obtained an order of seizure and sale of the lot in question, and I. T. Preston, Esq. was appointed curator *ad hoc*, to the heir who resided out of the state, and as a defensor to the suit.

At the sale of the property, on the 18th of October, 1834, Newland Holmes became the purchaser, as the last and highest bidder, for four thousand, three hundred and seventy-five dollars, payable on twelve months credit, on his giving

EASTERN DIST. his bond, with security and a mortgage on the premises, until
February, 1835. complete payment.

MILLIGHERS
vs.
HOLMES.

On the 10th of November, following, the purchaser having failed to comply with the terms of the sale, the plaintiff's counsel, on suggesting these facts to the court, obtained a rule on Holmes, to show cause why a *distringas* should not issue to compel him to comply with the conditions of his bid.

Holmes, in answer to the rule, averred that by advice of Hamblet's counsel, he tendered a bond to the sheriff, with good security and special mortgage on the property sold, for the sum of one thousand four hundred dollars, bearing ten per cent. interest, on seven hundred dollars, from the 1st of November, 1830, and the same interest on seven hundred dollars, from the 1st of November, 1831, to add in all the cost up to that time, and the bond made payable on the 18th of October, 1835, or to settle the costs in cash. The plaintiff refused to accept his bond ; but required one for two thousand and thirteen dollars, with ten per cent. interest, from the 18th day of October, 1834, until payment, and a special mortgage. He prays that his bond, first tendered, be accepted, and the rule discharged.

The parish judge decided that the plaintiff was entitled to interest on the amount of the two notes ; and interest thereon, up to the day of sale, but that the interest on the aggregate sum of principal, interest and cost, from that time, until paid, should be at the rate of five per cent. per annum, according to the following calculation :

Amount of capital, in the two notes.....	\$1400 00
Interest on \$700, from the 4th of November 1830, to the 18th of October, 1835.....	347 00
Interest on \$700, from the 4th of November, 1831, to the 18th of October, 1835.....	247 00
Interest on \$484, the amount of interest due on the capital, (\$1400) due the 18th of October, 1834, (day of sale) to the 18th of October, 1835, at five per cent.....	24 20
Amount of costs.....	129 00
Interest, at five per cent., for one year, on \$129.....	6 45
Total.....	\$2183 65

Judgment was rendered, requiring the purchaser, N. Holmes, to execute his bond for the above sum, with security and special mortgage, within three days from the notification of judgment, and on failure, a writ of *distringas* to issue. He appealed, together with the curator *ad hoc* of the absent heir.

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February, 1835.

HILLIGSBORG
vs.
HOLMES.

Preston, for the appellant.

D. Seghers, contra.

Martin J., delivered the opinion of the court.

The plaintiff suggested and informed the court of the first instance, that at the sale of certain immoveable property, made in pursuance of an order of seizure and sale, which had been obtained against said property, in the hands of the heir of the original purchaser, the defendant became the last and highest bidder for the sum of four thousand three hundred and seventy-five dollars, payable at twelve months, with interest, at ten per cent. per annum, with mortgage retained on the land, according to law, until final payment; and that he refused to comply with the terms of sale, whereupon a rule was taken against him, to show cause why a writ of *distringas* should not issue, to compel a performance of the conditions of sale, on his part.

The defendant answered, that by the advice of the owner of the property seized, he had applied to the sheriff, offering his bond, with good security and special mortgage, for the sum of one thousand four hundred dollars, with interest at ten per cent. on seven hundred dollars, from the 1st of November, 1830, and interest, at the same rate, on the remaining seven hundred dollars, from the 1st of November, 1831, together with all costs added, and the whole sum payable on the 18th of October, 1835; or to settle the amount of costs in cash.

The Parish Court was of opinion that the plaintiff was entitled to interest on the notes due, up to the day of sale, but that the interest due thereon, as well as that due on the

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February, 1835.

MILLIGRENS
VS.
BOLMES.

costs, must be reduced to the rate of legal interest, *i. e.* five per cent. ; and, consequently, the amount of the obligation to be delivered to the plaintiff must consist, *first*, of the amount of the two notes, or one thousand four hundred dollars ; *second*, of interest, at the rate of ten per cent. from the maturity of each note, to the day on which the defendant was bound to give his obligation, *i. e.* interest at ten per cent. on seven hundred dollars, from the 4th of November, 1830 ; and on a like sum, the same interest to be allowed, from the 4th of November, 1831, on each, up to the 8th of October, 1835 ; *third*, of interest, at five per cent., on the amount of interest due on the debt, up to the day of the sale, (October 18th, 1834) ; *fourth*, the plaintiff to have interest on his costs, from the day of sale until the maturity of his obligation, on the 18th of October, 1835. According to the above *data*, the obligation of the defendant, which he was required to execute and deliver to the plaintiff, amounted to two thousand one hundred and eighty-three dollars and sixty-five cents. Judgment was given accordingly, and both the present defendant, and the one in the writ of seizure and sale, appealed.

The counsel for the appellants have assigned the following errors in the judgment of the Parish Court, and on which they claim its reversal in this court :

1. That interest on interest is allowed, which is contrary to law, and expressly forbidden by the *La. Code*, art. 1984.
2. The present defendant, with the consent of the original one, in the writ of seizure and sale, offered a bond for the amount of the plaintiff's judgment, with interest, at ten per cent. and costs, or to pay the costs in cash. This should have been accepted, and the court erred in requiring more.

The appellee has complained of the judgment, and on his part has asked that it be amended in his favor.

He contends that he is entitled to a bond or obligation, in the sum of two thousand and thirteen dollars, with interest, at the rate of ten per cent., from the 18th of October, 1834, (the day of sale) until paid ; instead of an aggregate sum of

two thousand, one hundred and eighty-three dollars and sixty-five cents, payable on the 18th of October, 1835. EASTERN DIST.
February, 1835.

It appears to this court, that the provisions of the *La. Code*, art. 1984, invoked by the appellee, relates only to the stipulations of interest, made in a contract by the parties, and does not apply to cases in which the law allows interest.

HILLIGSBERG.
vs.
HOLMES.

When the sheriff sells property, on a credit of twelve months, for which two-thirds of the appraised value is not offered, at the first attempt to sell, he must require from the bidder, and the plaintiff is entitled to a twelve months' bond, for the same amount as he would be entitled to in cash, if it had been a cash sale, *i. e.*, his principal debt to the day of adjudication, and costs. This, the defendant in the execution, would be obliged to pay down, if he chose to prevent the sale of his property; and this sum, the purchaser is allowed to retain during a twelve month, on condition of his paying to the plaintiff an interest of ten per cent. This would not be mulcting any one with interest upon interest, on his contract. If the defendant does not buy his own property, and he is at liberty to do so or not, at his pleasure, he is subject to no interest, simple or compound, after the adjudication. If he chooses to buy, *volenti non fit injuria*. He cannot complain, if desirous of making a new contract he be constrained to enter into it on the terms which the law imposes on others. He pays simple interest on the defined price of his purchase; no compound interest is put on his old debt, for if he does not pay the twelve months' bond, and the creditor finds it necessary to avail himself of the judgment on which the *feri facias* issued, we are not ready to say that the property affected by the registry of the judgment, would be burthened by any additional interest, in consequence of the purchase, nor would any property of his, seized on a *feri facias*, issued thereafter, be liable to it.

The defendant in an execution is subject to no interest, simple or compound, after the adjudication of his property, whether on credit or for cash.

The Parish Court has, in our opinion, erred in allowing interest at a less rate than ten per cent., to the plaintiff, on any part of what he would have a right to receive in cash, if the sale had not been on credit.

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February, 1835.

MILLIGSBURG
vs.
HOLMES.

In a sale of property under execution, on twelve months credit, the purchaser is required to give bond for the whole amount of principal, interest and costs, due on the day of sale, as if made for cash; and on that aggregate sum, the same rate of interest is allowed in the bond, as that on the original debt, from the day of sale.

The judgment is, therefore, erroneous, and is annulled, avoided and reversed; and this court, proceeding to give such judgment as in our opinion ought to have been given by the court in the first instance, we are first to ascertain what sum the plaintiff would have been entitled to in a cash sale.

He claims, first, his principal.....	\$1400 00
Second, his interest on the two notes, from maturity.....	484 00
Third, the costs.....	129 00
Total.....	\$2013 00

To this sum, he appears to us to be clearly entitled, with interest, at ten per cent., *from the day of the adjudication.* Code of Practice, art. 681.

The parish judge was of opinion, that ten per cent. ought to be added to the sum, and the bond or obligation taken for the aggregate amount of capital, interest and cost, with the additional interest for one year. The appellee contends, that the bond or obligation ought to be for the above sum, with interest at ten per cent. per annum, from the day of adjudication until final payment, and not for two thousand two hundred and fourteen dollars and fifty cents.

Either of the two last modes would satisfy the words and spirit of the Code of Practice, art. 681, so equally, that we would not have felt induced to reverse the judgment, and to substitute that which appears most correct; but we are not considering what judgment ought, in our opinion, to have been given in the inferior court. We are not at liberty to give any weight to the opinion of the first judge, in this respect.

We are pressed to add the words, *until paid*. This we decline, because the code has not used them, and because they would, perhaps, be of no use, as the *La. Code, art. 1931*, has provided, that in contracts stipulating conventional interest, it is due from the time stipulated for its commencement, until the principal is paid.

It is, therefore, ordered, adjudged and decreed, that the rule obtained by the appellee, be made absolute, and the

When the judgment of the court *a quo* is amended on appeal, although both parties asked and obtained an alteration, the appellee will be required to pay costs in both courts.

distingas issue, until the appellant, N. Holmes, shall furnish his bond, or obligation, with good and sufficient security, and a special mortgage on the property sold, in the sum of two thousand and thirteen dollars, payable on the 18th of October, 1835, with interest, at the rate of ten per cent. per annum, from the 18th of October, 1834, the appellee paying costs in both courts.

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February, 1835.

CHALABON
VS.
VANCE.

CHALABON vs. VANCE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A note given in part payment of a contract, for erecting certain buildings secured by a mortgage on the ground, is negotiable, and it is no defence against it, either in the hands of the original or subsequent holder, that the buildings were not completed according to contract.

The paragh of a notary *ne varietur*, on a negotiable note, does not, in any manner, change the nature of its negotiability.

When there is no good and substantial cause for an appeal, it will be considered as frivolous, and taken for delay. In such cases, the judgment appealed from will be affirmed with ten per cent. damages.

This suit commenced by the executory proceedings, in which an order of seizure and sale was obtained against a piece of ground, mortgaged to secure the payment of several promissory notes, executed by the defendant, one of which, amounting to one thousand seven hundred and thirty-three dollars and thirty-three cents, had become due. The plaintiff alleges he is the *bona fide* holder of said note, now due and unpaid, and prays that the mortgaged premises be seized and sold to pay the same.

The defendant set up several grounds of defence, and resisted payment mainly on the ground that the work, for

EASTERN DIST. which the note now sued on was given in part payment, was
February, 1835. not executed according to contract. He obtained an
injunction.

CHALANON
VS.
VANCE.

The evidence shows the note was endorsed by the payee, in blank, and taken by the plaintiff, in due course of business.

The district judge, considering a difficulty existed, in relation to the mortgaged property, which was intended to secure the whole series of notes given, refused to order the premises to be seized and sold to satisfy this note alone, until the other notes came in for their proportion.

Judgment was rendered against the defendant, for the amount of his note, with interest and costs, reserving the hypothecary rights of the plaintiff, concurrently with the holders of the other notes, against the mortgaged property.

Canon, for the plaintiff.

Gray, *contra*.

Mathews, J., delivered the opinion of the court.

This is a suit, brought by an endorsee and holder of a promissory note, (made in negotiable form) by the defendant. Judgment was rendered against him in the court below, from which he appealed.

The note now sued on, is one of a series of notes, made by the defendant, in favor of a certain Paul Pandelly, in consequence of an agreement entered into between these parties, in which the latter contracted to erect buildings on a lot of ground belonging to the former. In this contract, a mortgage was stipulated, in favor of the builder, to secure the price of building, which was estimated at fifteen thousand nine hundred dollars, for which three series of notes were given, payable in six, nine and twelve months from the date of the contract. The first of these series, consisting of three notes, were made payable six months after date, and to be delivered to the undertaker, when the buildings should be commenced. Of these notes, that on which the present action is

based, is one. They were all identified with the contract and mortgage. EASTERN DIST.
February, 1835.

In the commencement of this suit, the plaintiff claimed an order of seizure and sale, in pursuance of the summary mode of proceeding on acts importing a confession of judgment. This mode of pursuit was afterwards changed into the *via ordinario*, and judgment rendered in the manner above stated.

The evidence shows, that the buildings were in progress before the note in question was transferred, by endorsement, to the plaintiff. From this statement, it does not appear to us that the defendant could have any legal or equitable grounds to resist its payment, even in the hands of the original payee, much less, in those of an endorsee and *bona fide* holder, in a due course of trade. It has been settled, long since, that a paraph of a notary *ne varietur*, on a negotiable note, does not, in any manner, change the nature of such an instrument, in relation to its negotiability.

We are unable to perceive any good or substantial cause for the appeal. It must, therefore, be considered as frivolous, and taken for the sake of delay, only.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs; and that the plaintiff, in addition to the amount of said judgment, do recover from the appellant and defendant, ten per cent. on the amount thereof, as damages, on account of his frivolous appeal.

CHALABON
VS.
VANCE.

A note given in part payment of a contract for erecting certain buildings, secured by a mortgage on the ground, is negotiable, and it is no defence against it, either in the hands of the original or subsequent holder, that the buildings were not completed according to contract.

The paraph of a notary *ne varietur*, on a negotiable note, does not in any manner change the nature of its negotiability.

When there is no good and substantial cause for an appeal, it will be considered as frivolous, and taken for delay. In such cases the judgment appealed from will be affirmed, with ten per cent. damages.

EASTERN DIST.
February, 1855.

CASTEL ET ALS.

VS.
THEIR CREDI-
TORS ET ALS.

CASTEL & DEVAUX VS. THEIR CREDITORS ET ALS.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
 NEW-ORLEANS.**

On an issue of fraud, the verdict of the jury is entitled to great weight; yet on examining the evidence, if it appears the demands of justice would be best promoted by another trial, the cause will be remanded.

Lafaye and Delpuch, two of the creditors of the plaintiffs, made opposition to the homologation of the proceedings of the creditors of the insolvents, so far as they had a tendency to discharge the insolvent debtors, or lessen their liabilities, on the ground of fraud, in not making a fair exhibit of their property, and giving undue preference to other creditors over them, and gambling and wasting away their property, &c.

Several specific charges of fraud were made out, to which a general denial was pleaded, and the case, on the evidence produced, was submitted to a jury, who returned a verdict discharging the defendants.

The opposing creditors moved for a new trial, on the ground that the verdict was contrary to law and evidence. The parish judge considered that the jury, when a fair trial was had, were the best judges of the *intentions* of the insolvents to commit a fraud, as charged; and having discharged them, on the whole evidence, refused the motion. From judgment rendered on the verdict, the opposing creditors appealed.

Canon, for the opposing creditors and appellants.

Soulé, *contra*.

Martin J., delivered the opinion of the court.

Lafaye and Delpuch, opposing creditors, have appealed from a judgment, discharging the insolvent debtors from an accusation of fraud.

Great is the weight which this court is ever accustomed to allow to a verdict, on an issue of fraud, especially when the party accused is discharged. But on a close attention and examination of the evidence in this case, the impression left on the mind of the court is, that the ends of justice would be best promoted by remanding the case for a second trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, the verdict set aside, and the case remanded for a new trial, the appellees paying the costs of the appeal.

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ESCURIX
vs.
DABOVAL.
On an issue of fraud, the verdict of the jury is entitled to great weight; yet on examining the evidence, if it appears the demands of justice would be best promoted by another trial, the cause will be remanded.

ESCURIX vs. DABOVAL.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT.

71 575
49 1048
7 576
112 29

In an action for false imprisonment and damages, under a *ca. sa.*, which was quashed for having illegally issued, the defendant may show, in justification and mitigation of damages, by argument and reference to the decisions of the Supreme Court, that the judgment quashing the writ is erroneous, when at the trial such judgment has not become *res judicata*.

A judgment, quashing an execution, has not passed in *rem judicatem*, when the matter in dispute is sufficient to authorize an appeal, and when a year has not elapsed from the date of it, to the time of trial, when it is offered as evidence, to show the writ was properly quashed.

This is an action to recover damages, of the defendant, for false imprisonment of the plaintiff, under a writ of *capias ad satisfaciendum*, which was quashed, as having illegally issued.

The defendant, in the present suit, obtained a judgment against the now plaintiff, for a sum of money, and levied his execution on certain property of the latter, which was afterwards claimed by the wife of the defendant in execution, in

EASTERN DIST. virtue of her judgment and legal mortgage against the
February, 1835. property of her husband, and the proceeds of the sale of the

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VS.
DABOVAL.

property were enjoined in the sheriff's hands.

The execution being returned *nulla bona*, and the defendant having removed to an adjoining parish, the plaintiff in execution, took out a *capias ad satisfaciendum*, directed to the parish where his debtor had removed. He was arrested and imprisoned for about twenty or thirty days, and obtained the prison limits, and finally had the writ of *ca. sa.* quashed. He then commenced the present suit for false imprisonment, claiming three thousand dollars in damages.

The defendant pleaded a general denial: denied false imprisonment, but that the plaintiff was legally arrested under legal process.

On the trial, the plaintiff offered in evidence the judgment quashing the writ of *ca. sa.* under which he had been imprisoned, to show, *first*, that such a judgment had been rendered; *second*, that the writ under which he had been arrested and imprisoned, was decided to be illegal. The defendant's counsel objected to the evidence being received for any other purpose than that such judgment was rendered, (*rem ipsam.*) The court admitted it, to prove the illegality of the writ and arrest; and refused to the defendant the privilege of arguing and reading to the jury the decisions of the Supreme Court, especially the case of *Whitman vs. Abat*, 7 *Martin, N. S.*, 162, to show the *ca. sa.* was legally issued, and that the judgment quashing it was illegal. The court refused it, upon the ground the judgment was *res judicata*, until appealed from, between the parties, so far as it established the fact of the writ having improperly issued. The defendant took his bill of exceptions.

The day of the trial was the 23d of October, 1834, and the judgment offered in evidence is dated the 29th of October, 1833.

The cause on the whole evidence, was submitted to a jury, who found for the plaintiff three thousand dollars in damages.

The defendant appealed from the judgment rendered thereon.

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vs.
DABOVAL.

A. Seghers, for the plaintiff, insisted that the judgment quashing the writ of *ca. sa.* as illegal, was *res judicata* between the parties, on the day of trial, the 23d of October, 1834, no appeal having been taken. It could not be inquired into, and the judge *a quo* very properly refused to permit any argument to go to the jury, with the view to show it was erroneous. *Pothier Traite des Obligation, No. 3.*

2. On the matters of fact, when damages are to be assessed, the jury are the proper judges of the *quantum*, and the court will not disturb their verdict. *2 La. Rep., 76.*

Nicholls, for the defendant, contended that the arrest and imprisonment of the plaintiff was legal, and justified it on the ground that no property was to be found, as shown by the return on the *feri facias*. *7 Martin, N. S. 162. Ibid., 221. 8 ibid., 315.*

2. The sale of the property first seized, the proceeds being tied up by the wife's injunction, was no satisfaction of the execution and judgment. The defendant was not bound to await the result of a tedious law-suit before proceeding against the person of his debtor.

3. The court *a qua* erred, in permitting the judgment quashing the writ of *ca. sa.* to prove any thing else, than that such judgment was rendered, (*rem ipsam.*)

4. The defendant had the right to show, by the decisions of this court, that the writ of *ca. sa.* properly issued in a case provided by law. These decisions are the highest evidence of what the law is, coming from the tribunal of the last resort.

5. The judgment, quashing the writ, might put an end to the imprisonment, but cannot change the law. It is no evidence of the law, as it was still open to appeal.

6. Nothing short of payment could satisfy the judgment, or deprive the appellant of the right of using all the means afforded by law, to coerce it. *3 Martin, 331.*

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ESCURIX
vs.
BAROVAL.

7. The damages are excessive. For error of judgment, in issuing the writ improvidently, and in the absence of proof of malice, the defendant should not be mulcted in vindictive damages.

Martin, J., delivered the opinion of the court.

In this case, the defendant has appealed from a judgment rendered on a verdict, in an action of false imprisonment.

He had obtained a judgment against the present plaintiff, and caused execution to be levied on some property, but the wife of the debtor procured an injunction to stay the proceeds of the sale of the property seized, in the sheriff's hands, in order that it might be paid over to her in discharge of a judgment she had obtained against her husband. The judgment creditor took out an alias *fieri facias*, directed to the sheriff of another parish, and on the return of *nulla bona*, sued out a *ca. sa.*, on which the debtor was arrested and imprisoned about twenty days, when he succeeded in having the writ of *ca. sa.* quashed. He was then liberated. For this alleged illegal arrest and detention, an action for false imprisonment was instituted, and he recovered three thousand dollars in damages.

The present defendant seeks to reverse and annul this judgment, on the score of excessive damages, and because the court denied him leave to show, by argument, and the reading of several decisions of this court, that the inferior court had erred in its decision, quashing the writ of *ca. sa.* The refusal was asked on the ground that the judgment quashing the *ca. sa.* was *res judicata*.

The position of the plaintiff was supported, and reliance placed, on the authority of 2 *Pothier on Obligations*, part 4, chap. 3, sec. 3, art. 1, No. 3.

We thence learn that the Ordinance of Louis XIV. in 1667, has joined in the same article, judgments in the last resort, and others susceptible of appeal, but not yet appealed from.

The Louisiana Code, in the chapter on the signification of terms, No. 9, has given the definition of *res judicata*. "*Thing*

adjudged," is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not *lie*, or because the time fixed by law for the appeal is elapsed, or because it has been confirmed on the appeal.

In the present case, the matter in dispute is sufficient to authorize the appeal; and as one year had not elapsed between the quashing of the *ca. sa.*, and the trial which preceded the judgment appealed from, it follows that the time for appealing from the former one had not elapsed. It had not, consequently, passed in *rem judicatem*.

This takes from the appellee the only means of defence which he has urged before this court. We have, therefore, not examined whether a judgment, which has not yet become *res judicata*, may be incidentally examined between the same parties, in the court which has rendered it. This court being of opinion that the defendant ought to have been allowed, by argument and reference to decisions of the Supreme Court of the state, to show that he had reason to believe that in taking out the *ca. sa.*, he exercised a legitimate means for the securing of money tortiously withheld from him, if not in positive exculpation of his conduct, at least in mitigation of the damages claimed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the verdict set aside, and the case remanded, with directions to the judge to proceed therein, and to allow the defendant, by argument and reference to decisions of this court, (if not positively to exculpate himself, on which we give no decision,) at least to mitigate the damages claimed; the plaintiff and appellee paying costs in this court.

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February, 1855.

ESCURIX

VS.

DABOVAL

In an action for false imprisonment and damages, under a *ca. sa.*, which was quashed for having illegally issued, the defendant may show, in justification and mitigation of damages, by argument and reference to the decisions of the Supreme Court, that the judgment quashing the writ is erroneous, when at the trial such judgment has not become *res judicata*.

A judgment, quashing an execution, has not passed in *rem judicatem*, when the matter in dispute is sufficient to authorize an appeal, and when a year has not elapsed from the date of it, to the time of trial, when it is offered as evidence, to show the writ was properly quashed.

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GUILLET
vs.
ERWIN.

GUILLET vs. ERWIN

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where the defendant lives alternately in Kentucky and Louisiana, prescription only runs for the time he is actually in this state.

So, where two years had elapsed, from the date of the sale until institution of suit, for redhibitory vices in slaves, and it was shown the defendant had only been ten months in the state, during that time: *Held* the action was not prescribed by the lapse of one year.

This is a redhibitory action, for the rescission of the sales of two slaves and return of the price.

The plaintiff alleges, that in February and March, 1829, he purchased two slaves from the defendant, for six hundred dollars each. That soon afterwards, one was discovered to be crazy or mad, and ran away, and the other had a consumption, of which he died shortly afterwards. He alleges both slaves are dead, and the defendant refuses to return him the price, being twelve hundred dollars, for which he prays judgment.

The defendant admitted the sale of the slaves, but expressly denies all the other allegations in the petition, and pleads the prescription of one year.

The evidence showed the slaves became diseased after the sale, and ultimately died in the possession of the defendant. But the testimony was a little contradictory as to the origin and time when the disease actually existed.

It also appeared, that the sales were made in February and March, 1829, and suit was not commenced until March, 1831; that the defendant lived alternately in Kentucky and Louisiana, and had been repeatedly in this state, after the contract of sale, and from the testimony, the whole time was about ten months of actual residence here in the interval.

The plaintiff had judgment for the return of the price paid for the slaves, with legal interest from judicial demand.

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February, 1835.

The defendant appealed.

GUILLEMET
VS.
ERWIN.

Canon, for the plaintiff.

McCaleb, for the appellant.

Mathews, J., delivered the opinion of the court.

This is a redhibitory action, in which the plaintiff obtained judgment in the court below, and the defendant appealed.

The allegations of the petition relate to two slaves, sold by the defendant to the plaintiff; and the redhibitory defects stated to have been inherent in them, are idiotism or madness in one, and confirmed consumption in the other. The evidence of the case, (although somewhat contradictory,) such as it was admitted by the court below, (and, in our opinion properly admitted, notwithstanding several bills of exception) establishes the existence of the vices or defects in the slaves, as alleged, sufficient to form a legal ground of redhibition.

The answer of the defendant, however, contains a plea of prescription on which his counsel seems much to rely.

The suit was not brought within the delay prescribed by law: but the absence of the defendant from the state, who is not domiciled within its limits, is offered as an excuse and justification on the part of the plaintiff, for not having commenced his suit. This justification is founded on the maxim, *contra non valentem agere, non curret prescriptio*. The service of citation on the defendant was made on the 15th of March, 1831. The sales of the slaves in question, to the plaintiff, are dated in February and March, 1829. On the 11th of June of this year, the defendant left the state. He returned on the 5th of December, of the same year, and left again on the 24th of April, 1830, and came back about the 10th of January, 1831, a little more than two months previous to the commencement of the present suit. It results from calculations based on these data, that the defendant had been in the state about ten months only, at different periods

Where the defendant lives alternately in Kentucky and Louisiana, prescription only runs for the time he is actually in this state.

So where two years had elapsed, from the date of the sale until institution of suit for redhibitory vices in slaves, and it was shown the defendant had only been ten months in the state, during that time: *Held*, the action was not prescribed by the lapse of one year.

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February, 1835.

GUILLET
vs.
KEWLE.

subsequent to the date of the earliest bill of sale, made by him to the plaintiff, of the slaves in dispute ; consequently, a whole year had not expired, within which he had a right to act and could act against the defendant, before the institution of this suit, and as a necessary consequence of the foregoing premises, it follows that the plea of prescription fails.

We have said in general terms, without specific arguments on the several bills of exception, found on the record, that the testimony offered on the part of the plaintiff, was properly admitted by the court below. But should we admit doubts whether the testimony of the witness, E. D. White, ought not to have been rejected, on the score of interest, leaving it out of the question, our conclusion would be the same.

This testimony has relation, principally, to a consent or agreement of the seller to take back the slaves complained of by the purchaser, but the causes of redhibition being established by other competent evidence, and the plea of prescription having failed, the plaintiff's case is considered as fully made out.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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BEAL ET ALS.
vs.
BRANDT ET ALS.

BEAL & WIFE vs. BRANDT & WIFE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the notice to take a deposition is not given in full time, as required by law, yet when the party sends her attorney to the commissioner, who appears, and objects to taking the deposition, on the ground of defective notice, this fact will render the notice sufficient.

Where the name of a witness is written *C. Swabine* in the affidavit for a commission, and *Catherine Swab* in the deposition, the discrepancy in names will not vitiate the deposition, when it is in other respects taken according to law.

The law does not require a commissioner before whom a deposition is taken, to reduce it to writing personally. It is sufficient, if not written by the witness, that it be reduced to writing by any indifferent person.

When a deposition is accompanied by the certificate of the commissioner, that it was taken by him, and sworn to and subscribed before him, it is a sufficient *proces verbal* of the manner of taking it.

This is an action of slander, for slanderous words spoken by the wife of Brandt, respecting the wife of Beale, and for an assault and battery committed by Beale on Brandt's wife; damages laid at one thousand dollars.

The plaintiffs allege that the wife of John Brandt, publicly, maliciously and wickedly called Mrs. Rosina Beale a thief and a whore, and with a view to defame her character; that such charges are false and malicious, and have damaged her in the estimation of her neighbors. They further allege, that John Brandt came to plaintiffs' house, and in the absence of her husband, without cause, assaulted, beat and whipped the plaintiff, Mrs. Beale, in a cruel manner; all of which matters have caused her great injury and damage, to the amount of one thousand dollars.

The defendants pleaded a general denial, and alleged that Rosina Beale, one of the plaintiffs, had for four months harras-

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BRAL ET AL.
vs.
BRANDT ET AL.

sed and slandered Mrs. Brandt, calling her a thief, and charging John Brandt the husband, with stealing sheep, &c., all of which is false and malicious, and was uttered by Mrs. R. Beale, knowing it to be false, and with a view of injuring her in public estimation, &c. ; that in consequence of said slander and defamation, she has suffered damage, to the amount of five thousand dollars, for which she prays judgment in re-convention.

The plaintiffs excepted to the plea and demand in re-convention of the defendant, as matter independent, and unconnected with, and not incidental to the cause of action ; they averred the demand and allegations set up in defendants' answer were too vague and uncertain, as to time and the manner of making the charges alleged, and pray that the answer be amended.

On the trial, the reading of the deposition of a certain Catherine Swab, was objected to by the defendants' counsel, on various grounds, as stated in the opinion of this court, but being admitted, the defendants' counsel took his bill of exceptions.

The cause was submitted to a jury on all the testimony, who returned a verdict for the plaintiffs of two hundred and fifty dollars. From judgment rendered on this verdict, the defendants appealed.

Culbertson and Kennicott, for the plaintiffs.

Roselius, contra.

Martin, J., delivered the opinion of the court.

This is an action of slander, and assault and battery, with a claim for damages. The hopes which the fair defendant entertains of having the judgment of the fair plaintiff reversed, rest on the alleged error of the judge *a quo*, in admitting testimony offered by the plaintiff, but objected to by the defendant.

The grounds on which the reading of the deposition offered by the plaintiff, was objected to, are :

1. The insufficiency of the notice.
2. That of the affidavit on which the commission issued.
3. That the deposition was not reduced to writing by the commissioner.
4. That no *procès verbal* is annexed to the commission.

It appears that the notice was issued on the 30th of April, to appear before the commissioner on the same day, at two o'clock, P. M. The hour at which the service was made, does not appear in the record, but has been stated in argument to have been about 11 o'clock, A. M. The witness was obliged to leave the city unexpectedly and go home, on account of her husband's sickness, and that she had not communicated this to the plaintiff, until the morning of the day on which she was examined, being the eve of the one on which she expected to depart.

As all the parties resided in New-Orleans, and the defendant sent her attorney to the commissioner's office, for the purpose of objecting to the insufficiency of the notice, before she heard the deposition was taken, we conclude the notice was sufficient.

2. The affidavit on which the commission issued, is objected to, on account of the inaccuracy in the name of the witness, and because it is said the affidavit is not made as the law requires. In the affidavit, the name of the witness is written C. Swabine, and in the deposition she is called Catherine Swab. In other respects the affidavit appears to us, to have been made according to the article 430 of the Code of Practice, under which we suppose the commission was asked for. Swab may be a contraction of Swabine; as the attorney of the defendant objected before the commissioner, to the shortness of the notice only, we think the District Court did not err, ordering the deposition to be read.

3. Nothing in our law requires the commissioner to reduce the depositions he receives to writing personally. It suffices when not written by the witness, that they be taken down by an indifferent person. In the present case the deposition was taken by the clerk of the commissioner, an associate justice of the City Court.

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Where the notice to take a deposition is not given in full time, as required by law, yet when the party sends her attorney to the commissioner, who appears and objects to taking the deposition, on the ground of defective notice, this fact will render the notice sufficient.

Where the name of a witness is written C. Swabine in the affidavit for a commission, and Catherine Swab in the deposition, the discrepancy in names will not vitiate the deposition, when it is in other respects taken according to law.

The law does not require the commissioner before whom a deposition is taken, to reduce it to writing personally. It is sufficient, if not written by the witness, that it be reduced to writing by an indifferent person.

When a deposition is accompanied by the certificate of the commissioner, that it was taken

EASTERN DIST. 4. The commission and deposition are accompanied with
February, 1835. the commissioner's certificate, of the deposition having been
 taken by him.

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VS.
ST. HOMES ET ALS. The deposition was, in our opinion, properly received in
 evidence.
 by him, and sworn to and subscribed before him, it is a sufficient *procès verbal* of the manner of taking it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HART & CO. vs. ST. HOMES ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where offences are committed by slaves belonging to several masters, by their order, they will be liable as direct trespassers *in solido*.

But where the slave of A, in company with the slaves of B, commits an offence, it is clear that A cannot, according to the *Louisiana Code*, be made responsible beyond the value of his slave, if he thinks proper to abandon him.

After the master abandons his slave, he still retains a residuary interest: that if the sale of him produces more than the amount of the damages awarded, he is entitled to the surplus.

The master is not *in mora* in making the abandonment of the slave until three days after the judgment. Until the judgment is *res judicata*, the party has not lost his right of liberating himself by abandonment; or if the abandonment becomes impossible by a fortuitous event, without the fault of the master, he is liberated.

Where several slaves, belonging to different masters, commit a theft, the masters should be condemned to pay in proportion to the number of slaves respectively who were accomplices in the theft.

So where A was the owner of three out of five slaves concerned in a robbery, he is liable to pay three-fifths of the value of the stolen goods.

The plaintiff alleges that his store on Chartres-street, in the city of New-Orleans, was broken open by several slaves belonging to the defendants, and goods, jewelry and merchandise, to the value and amount of two thousand five hundred and fifty-six dollars and seventy-nine cents, stolen by said slaves, for which their masters are liable *in solido*. The petitioners annex an account of the goods stolen, with the value and amount thereof, and an affidavit that the account is true, and the loss happened in the manner described in the petition.

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HART ET ALS.
VS.
ST. ROMES ET ALS

St. Romes pleaded a denial generally; and specially denied that there was any *solidarity* between him and the other defendants, or that his slaves had any agency in the theft alleged.

Debuys pleaded a general denial; and also abandoned his slave to be sold according to law in case of liability.

Baylé pleaded the general denial.

On the trial, the evidence fully established the robbery of the plaintiffs' store, of the goods and to the value and amount charged, by the slaves Charles, Sophia and Frontin, belonging to the defendant *St. Romes*, the slave Jean Pierre, belonging to *Debuys*, and slave *Aglaë*, owned by *Baylé*.

The district judge rendered judgment in favor of the plaintiffs for the amount of their claim, against the defendants *in solido*.

St. Romes, one of the defendants, appealed.

Janin, for the plaintiff, contended that the evidence fully justified the judgment of the District Court in relation to the amount of the plaintiffs' claim, and it must therefore stand.

2. The questions of law respecting the liability of the defendants, are also correctly decided and settled. When an offence is committed jointly, by several slaves belonging to

EASTERN DIST. different masters, the latter are responsible, *in solido*, for the damages. *Louisiana Code*, art. 180, 2300, 2304. *Code of February, 1835.*

HART ET ALS.
 vs.
 ST. ROMES ET ALS.

Practice, 114. *Digest of Roman Law*, lib. 9, tit. 4, *de nox. act.* lex 41. *Ibid*, lib. 47, tit. 4, lex 1, § 19. 11 *Toullier*, 211, 403. *Pothier on Obligations*, No. 453. *Paillet*, art. 1384, No. 16. *Pothier's ed. Pandects*, vol. 4, p. 485—487, 489, 499, translated into French.

3. When the slave dies after the master is *in morâ*, or after the institution of suit, he is bound for the amount of damages and cannot liberate himself. *Digest*, lib. 9, tit. 4, lex 16, *de nox. act.* lex 26, § 4. *Ibid*, lib. 44, tit. 7, (*de oblig.*) lex 45, note g of *Godefroy*. *Ibid*, lib. 9, tit. 4, (*de nox. act.*) lex 29, § 4.

4. The last mentioned point does not bear on this case, as the surviving slaves were not abandoned within the legal delay.

Canon, contra.

Bullard, J., delivered the opinion of the court.

This suit was instituted to recover of the defendants, *in solido*, the value of certain merchandise alleged to have been stolen, at different periods, by the slaves of the defendants, from the store of the plaintiffs. The District Court was satisfied, from the evidence adduced, that the thefts were committed by Jean Pierre, a slave of Pierre Debuys; by Charles, Sophia, and Frontin, belonging to the defendant, St. Romes; and Aglaë, a slave of the other defendant, Baylé, and condemned the masters to pay, *in solido*, the value of the stolen goods, to wit: the sum of two thousand five hundred and fifty-six dollars and seventy-nine cents. From this judgment St. Romes alone has appealed.

The evidence in the record, which we have attentively examined, satisfies our minds, as it did that of the judge *a quo*, that the slaves above mentioned committed the depredations in question, and the plaintiffs are entitled to remuneration, at least to the value of the slaves. But it is contended that the judge erred in condemning the masters, *in solido*.

On the other hand, it is urged that if the slaves were persons, *sui juris*, they would be liable, *in solido*, for damages committed by them jointly, and that the masters are liable in the same manner the slaves would be if personally amenable in an action of trespass. It is a well settled doctrine of our law that *solidarity* is never implied. It is equally true that joint trespassers are severally bound, but the Code has regulated the responsibility of masters in a manner which seems to us inconsistent with the idea of *solidarity*, properly so called. Articles 180 and 181 declare the liability of the master for the offences and *quasi* offences of his slave, but expressly provide that he may discharge himself from such responsibility by abandoning his slave to the person injured, provided the abandonment be made within three days after the judgment awarding such damages, and that the offence was committed without his order.

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HART ET AL.
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ST. ROMES ET AL.

Where offences are committed by slaves belonging to several masters, by their order, we have no doubt the masters would be liable as direct trespassers, *in solido*. But if the slave of A, in company with several slaves of B, commits an offence, it is clear that A cannot, according to the Code, be made responsible beyond the value of his slave, if he thinks proper to abandon. In what sense of the word, then, can he be said to be bound, *in solido*, with B? It surely will not be pretended, that if the owner of the larger number of slaves concerned in a robbery should pay the whole amount of damages committed, he would be entitled to an action against the other masters whose slaves were accomplices, to compel an equal contribution, as in the case of an obligation *in solido*. Such a proceeding would equally violate the positive provision of the code, according to which the liability of the master is in all cases measured by the value of the slave, if he chooses to surrender him. It would be permitting that to be done indirectly which could not be done directly.

Where offences are committed by slaves belonging to several masters, by their order, they will be liable as direct trespassers *in solido*.

But where the slave of A in company with the slaves of B, commits an offence, it is clear that A cannot, according to the *La. Code*, be made responsible beyond the value of his slave, if he thinks proper to abandon him.

But the counsel has called our attention to numerous passages of the Roman Digest, particularly the 4th title of the 9th book, which treats of the *actio noxalis*, and which, he supposes, support the doctrine contended for by him. It

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results from all those provisions of the Roman laws, according to our understanding of them, that the *actio noxalis*, properly speaking, was essentially an action *in rem*, and followed the offending slave into whosoever hands he might pass after the commission of the offence. Not only might the master liberate himself by an abandonment of the slave, but the death of the offender, before the master was in delay in relation to the abandonment, operated, *ipso facto*, as a release of his liability. In cases where the master had fraudulently ceased to possess the slave, as by conniving at his escape with a view to evade responsibility, he was liable to the *Pretorian action*, and had no longer the right to abandon. It is in reference to this action, and not to the direct *noxalis*, that Julian declared, in the passage particularly relied upon by the plaintiffs' counsel, that if a slave belonging to several masters commit a theft, the party injured might select either of the owners and recover the whole damage. The case supposed by him, is when all the joint owners participated in the fraud practised, to evade the direct action: *Omnes dolo fecerint quominus sum in protestate haberant*. The same principle would apply where several slaves belonging to several masters had concurred in the offence, and all the masters had united in an attempt to remove the slaves fraudulently. In that case they would become personally wrong doers, and each responsible, *in solido*. In all such cases the party aggrieved had a right to pursue the slave himself, *actione noxali*, or to resort to the *Pretorian action*.

The passage in the 47th book of the Digest, on which the counsel also relies, does not appear to us to sustain him. The principle therein established is, that if several slaves are emancipated and fraudulently commit a trespass, each is liable, *in solido*; and in cases of crimes it goes further: "*Ex cum ex delicto conveniatur, exemplo furti, nullus eorum liberetur, etsi unus conventus prastiterit.*"

The counsel for the plaintiff contends for the further proposition, that when the slave dies after the master is *in mora*, or after the institution of the suit, the master is bound for the full amount of damages, and cannot liberate himself by an

abandonment. A careful examination of all the laws cited in support of this doctrine, has brought us to the conclusion, that in relation to the direct *actio noxalis* the master might abandon even after judgment. A distinction is made: if the master abandoned at the inception of the action, the complainant became seized only of the rights of the master, such as they were, and the master was fully released. If he made a defence and abandoned after condemnation, he was bound to convey the whole property in the slave, and became, in effect, warrantor of title: "*Sed oportet ret hujus dominium in solidum et pleno jure transferat in actorem.*"

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Our own code, while it has adopted the general principles of the Roman law, in relation to this action, has at the same time created some remarkable differences. In the first place, the abandonment on the part of the master, does not vest in the party aggrieved, the title to the offending slave. The master still has a residuary interest, if a sale of the slave produces more than the amount of the damages awarded. In the second place, the master is not in delay in making this abandonment, until three days have expired after the judgment. Until the judgment has acquired the authority of the thing adjudged, we are of opinion the party has not lost his right to liberate himself by an abandonment; and if the abandonment becomes impossible, by a fortuitous event, without the fault of the master, he is liberated from responsibility.

After the master abandons his slave, he still retains a residuary interest, that if the sale of him produces more than the amount of the damages awarded, he is entitled to the surplus.

We have thought proper to be thus minute in the investigation of these questions, and perhaps, to anticipate some which may arise in the further prosecution of this case, because the case is novel and the principles involved important in this state. Our researches have not enabled us to find a single case, in which the responsibility of several masters, in relation to each other, for the joint offence of their respective slaves, has been judicially settled. The Code does not expressly provide for a case of this kind. In the absence of positive enactments, we think ourselves bound to decide according to natural equity, and in such a way as not to violate any settled principles in relation to the liability

The master is not *in mora*, in making the abandonment of the slave, until three days after judgment. Until the judgment is *res judicata*, the party has not lost his right of liberating himself by abandonment; or if the abandonment becomes impossible by a fortuitous event, without the fault of the master, he is liberated.

Where several slaves belonging to different masters, commit a theft, the masters should be condemned to pay in proportion to the number of slaves respectively, who were accomplices in the theft.

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So where A was the owner of three out of five slaves, concerned in a robbery, he is liable to pay three-fifths of the value of the stolen goods.

of masters, and more especially, not to make one master liable for the thefts committed by the slaves of another, nor for those committed by his own, beyond their value, if he makes a fair abandonment in due time. The rule of decision which, after mature reflection, appears to us most equitable and in consonance with those principles is, that the masters should be condemned to pay in proportion to the number of their slaves respectively, who were accomplices in the commission of the offence. St. Romes is the only party who has appealed, and he is shown to be the owner of three out of the five slaves concerned in the robbery, and, in our opinion, is liable to pay three fifths of the value of the stolen goods.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled, and that the plaintiffs recover of the defendant and appellant, St. Romes, the sum of fifteen hundred and thirty-four dollars and seven cents, with costs of the District Court, those of the appeal to be borne by the plaintiffs and appellees; provided that this judgment shall be without effect, if, within three days after it shall have become final, the defendant shall abandon the surviving slaves, Charles and Frontin, according to law.

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TUTHILL ET AL.
vs.
EMERSON.

TUTHILL & FULLER vs. EMERSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the syndic makes himself a party plaintiff to a suit, in place of the original one, who is a ceding debtor, without objection on the part of the defendant, he has the right to contest the case and receive judgment.

The objection to the capacity of the plaintiff to sue, comes too late after answer to the merits and the jury are sworn on the trial.

This is an action, by two partners in building, to recover from the defendant three thousand six hundred dollars, the price of building six two story houses, and five hundred dollars for extra work, and one thousand dollars in damages, for delays occasioned by the defendant, in not furnishing materials as fast as the work progressed, according to contract.

The defendant pleaded a denial, and set up a demand in compensation of that sued on, for the sum of two thousand and sixty-two dollars, for advances and payments made to the plaintiffs. He alleges the work was badly done, delayed a year beyond the time agreed on in the contract, and finally abandoned by the plaintiffs, and was completed by other workmen, employed at his own expense, all of which occasioned him three thousand dollars damages, for which he prays judgment in reconvention.

This suit was instituted in February, 1831. On the trial the defendant offered in evidence the record of a suit of Tuthill vs. His Creditors, filed in March, 1830, which showed that one of the plaintiffs was insolvent, and had made a surrender in favor of his creditors, and a syndic appointed; and at the same time, moved the court to instruct the jury that no verdict could be found against the defendant, as suit was not instituted in the name of the syndic of Tuthill, and Fuller the other partner. The court refused the instruction,

EASTERN DIST. but charged that the plaintiffs could recover, as the syndic
February, 1835. was subsequently made a party, on motion of the plaintiffs'
TUTHILL ET AL counsel. The defendant excepted to the opinion and charge
VS. of the court.
EMERSON.

Upon the evidence of the case, the jury returned a verdict for the plaintiffs, in the sum of two thousand and eighty-two dollars, upon which judgment was rendered in favor of the syndic and Fuller. The defendant appealed.

Gray, for the plaintiffs.

1. The objection that the suit was not brought in the name of the syndic of Tuthill and Fuller, should have been pleaded as an exception, and time allowed for the opposite party to produce evidence to contradict it; otherwise, it is taking the party by surprise. *Code of Practice*, art. 327, 346.

2. Had an exception been pleaded, the court would, even afterwards, have allowed an amendment, which would have brought the proper parties before it. *4 La. Rep.*, 150.

3. The syndic was properly made a party, on motion of the plaintiff, before the trial. Such a motion was equivalent to a supplemental petition. *2 La. Rep.*, 392.

4. The verdict of the jury is not excessive; nor, indeed, as much as the evidence warranted, because no allowance is made for damages occasioned by the delay of the defendant.

Conrad, for the appellant.

1. The plaintiffs suit should have been dismissed for want of proper parties, as Tuthill had made a cession of his property at the time of suit, and could not stand in judgment in a case which arose before his insolvency and failure. *4 Martin, N. S.* 103.

2. This defect in the pleadings could not be cured in an *ex parte* motion, making the syndic of Tuthill a party, and which motion was not made until a year after the suit was at issue. *2 Martin*, 144. *6 Martin, N. S.* 417.

Bullard, J., delivered the opinion of the court.

In this case our attention is drawn to a bill of exceptions, from which it appears, that on the trial of the case, the defendant's counsel having introduced the record of a suit by Tuthill, one of the plaintiffs against his creditors, by which it appeared that he had made a surrender of his property as an insolvent debtor, and that a syndic had been appointed, moved the court to instruct the jury, that no verdict could be rendered by them against the defendant, on the ground, that the suit should have been instituted by the syndic jointly with the other plaintiff. The court refused to give that charge, but on the contrary, instructed the jury that the suit could be maintained, because the syndic by an *ex parte* proceeding, had made himself a party to the suit on motion.

We are of opinion the court did not err, although the plaintiff, who had made a surrender, was without capacity to sue in relation to a debt due him before the surrender, yet his syndic came in and made himself a party, without any objection on the part of the defendant. No exception was made to the capacity of the plaintiff; on the contrary the answer goes to the merits, and sets up a demand in re-convention. The objection came too late, after the jury had been sworn to try the issue on the merits of the case.

On the merits, an attentive examination of the evidence, has failed to convince us that the verdict was erroneous.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Where the syndic makes himself a party plaintiff to a suit in place of the original one, who is a ceding debtor, without objection on the part of the defendant, he has the right to contest the cause and receive judgment.

The objection to the capacity of the plaintiff to sue comes too late, after answer to the merits, and the jury are sworn on the trial.

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FEATHERSTONE

vs.
ROBINSON.

71 506
 46 1428

FEATHERSTONE vs. ROBINSON.*

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ST. TAMMANY.

Where the plaintiff sues as heir of his wife, and his capacity to sue not being denied by the pleadings, he was not required to prove his wife's death.

Civil Code of 1808, required all the formalities in a will to be complied with, before turning aside to other acts, but did not require mention of these in the will.

Irregularity and impropriety in the form of action is waived by pleading to the merits, and proceeding to trial without making the objection.

Judgment will be reversed, where interest is allowed on an unliquidated claim.

The plaintiff sues to recover his late wife's inheritance from the defendant, as executrix of her deceased mother. He alleges that Maria Badon died in 1820, leaving nine children as her heirs; that he intermarried with one of said heirs, who also died in 1825 without descendants, and leaving a will in which she made her husband, the present plaintiff, her universal heir and legatee; that previous to the death of his wife, another of the heirs of her mother died, and before partition, leaving her estate to be divided into eight portions or parts; that said Maria Badon left property, estimated in the inventory of her succession, at eight thousand and seventy-six dollars, to which he, as legatee of his wife, was entitled to one-eighth part. He prays that the executrix be required to render an account, and that the money and property be divided among the heirs, and his portion in right of his wife, be paid over to him.

* This case was decided at February term, 1827, and suspended by an application for a re-hearing until this term. The re-hearing was refused.

The plaintiff annexed a copy of the will made by his late wife, before C. Pollock, notary public, to his petition.

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The executrix addressed a letter to the judge of probates, praying further time in which to render her account, and shortly afterwards presented three accounts, one of the estate of her testatrix, and one against each of the deceased heirs, including the late wife of the plaintiff.

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ROBINSON.

The probate judge, after adjusting the accounts, rendered judgment in favor of the plaintiff, for one thousand one hundred and fourteen dollars and eighty-four cents, as the portion of his deceased wife of the funds on hand, and reserved his share in a tract of land remaining to be divided, until partition was made. The executrix appealed.

Preston, for the plaintiff.

1. The will under which the plaintiff claims, is made in due form of law, before a notary public.

2. It could not have been recorded in the office of the register of wills, or ordered to be executed here, as Mrs. Featherstone's succession was opened in the parish of St. Tammany. Had the probate of the will and Mrs. Featherstone's death been denied, they would have been proved.

3. The sum for which judgment was rendered, shows it to be one-eighth part of the proceeds of Mrs. Badon's succession then on hand, to which the plaintiff was entitled as heir of his wife.

4. The claim set up by the executrix, in her account against the succession, and against Mrs. Featherstone, are unsupported by vouchers, and cannot be allowed.

5. The parish judge being perfectly acquainted with the succession, settled and adjusted the accounts from his own personal knowledge of them, and from what appeared on the record.

6. The executrix has charged Mrs. Featherstone with five hundred dollars, advanced to her by her father, in his life-time. This has nothing to do with her mother's estate, and is wholly inadmissible.

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Hemen and Denis, for the defendant, assigned errors apparent on the face of the proceedings in the Probate Court, on which they rely for the reversal of its judgment. They are stated in the opinion of the court.

2. The defendant's counsel further contend, that when the executrix obeyed the order of court, and filed her account, that the plaintiff (if he had any) should have filed his written objections and opposition to each item in the account, to which he might object, that it be established or rejected, as justice and the law requires. *Code of Practice*, 1004.

3. The objections must be made in three days, and not having been done, the account must be taken as correct. Executors, &c., are sworn officers of the law and the court, and their accounts are *prima facie* evidence of their correctness. The judgment in this case is therefore erroneous, and should be reversed, and the executrix's accounts allowed.

Martin J., delivered the opinion of the court.

In this case the plaintiff sues as heir of his late wife, to recover from the defendant, as the executrix of his wife's mother, the portion which his wife inherited from her mother. The plaintiff obtained judgment in the Court of Probates, from which the defendant appealed.

The appellant in this court, relies upon the following assignment of errors :

1. There is no evidence of the death of the plaintiff's wife.
2. The document annexed to the petition, is illegal evidence of her will, being the copy of a copy. The will does not appear to have been presented to the Court of Probates, nor its execution ordered ; and because the document appears to be in fact no will, as it contains no mention that the legal formalities were complied with, without interruption or turning aside to other acts.
3. The suit is wrongfully brought for an account of the estate, instead of the plaintiff claiming to be recognised as heir of his wife.
4. The defendant had nothing to do but to file her account, and the plaintiff ought to have filed written objections to any exceptionable item found therein.

5. The Probate Court erred in refusing to allow the funeral expenses, and in allowing interest. EASTERN DIST.
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I. The plaintiff in this case sued as heir of his late wife, and his capacity not being denied by the pleadings, there was therefore, no necessity to prove the death of his wife, without which he could not be her heir. *Nemo est hares viventes.*

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II. It appears from the record, that no opposition was made in the Probate Court, to the admissibility of the document annexed to the petition, in evidence, which is now objected to in this court.

The former Code required indeed, that all the formalities in a will should be complied with, without any interruption, and without turning aside to any other acts; but it did not require, that mention of this circumstance be made in the will. *Civil Code, art. 92, p. 228.*

III. In relation to the manner of bringing the suit, any impropriety or irregularity in the form of the action was waived, by pleading to the merits, and proceeding to trial without making the objection.

IV, V. The plaintiff charged the defendant, as executrix of his late wife's mother, claiming the portion she inherited from her said mother.

The defendant filed an account, and the court gave judgment for the balance, after striking off such items as were unsupported by proof. Interest was however, in our opinion, improperly allowed. The sum claimed was not liquidated, until ascertained by the judgment of the court. In this respect only, the judgment of the Probate Court is erroneous.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed; and the plaintiff recover from the defendant the sum of nine hundred and thirty-four dollars and sixty-two cents, with costs in the Court of Probates; and that the costs of the appeal be borne by the appellee.

Where the plaintiff sues as heir of his wife, and his capacity to sue not being denied by the pleadings, he was not required to prove his wife's death.

Civil Code of 1808, required all the formalities in a will to be complied with, before turning aside to other acts, but did not require mention of these in the will.

Irregularity and impropriety in the form of action is waived, by pleading to the merits, and proceeding to trial without making the objection.

Judgment will be reversed, where interest is allowed on an unliquidated claim.

I N D E X

OF

P R I N C I P A L M A T T E R S .

A C T .	P A G E .
<p>1. There is no distinction as to the parties, between public and private acts not recorded, in relation to the title to slaves. Between the parties to a contract, an act under private signature has the same force and effect as a notarial act. They differ as to the mode of proof.</p>	<p><i>Bradford's Heirs vs. Clark</i>, 147</p>

A C T I O N .	
<p>1. In a petitory action, when the plaintiffs fail to show title in themselves, it will not be deemed necessary to inquire into the validity of the proceedings in pursuance of which the property was sold to the defendant.</p>	<p><i>Vidal's Heirs vs. Duplantier</i>, 37</p>
<p>2. In a petitory action, the plaintiff cannot recover any part of the land in the possession of the defendant, which is covered by the defendant's title, and is not shown to be embraced within the limits of the patent under which the plaintiff holds.....</p>	<p><i>Bourman vs. Flower</i>, 106</p>
<p>3. In an action against A for a <i>tort</i> and B on a contract, it is not a joint action, although both parties were brought before the court at once in the same suit.....</p>	<p><i>Regillo & Bryan vs. Lorente et als.</i> 140</p>
<p>4. In a possessory action the parties are precluded from going into an inquiry of title; and the defendant will not even be permitted to show that the disputed premises is a public place or port destined to public use.</p>	<p><i>Depassau vs. Winter et als.</i> 1</p>
<p>5. When the evidence shows that the <i>locus in quo</i> does not cover the high road, a street, levee, or tow-path, and is consequently subject to private ownership, whether the plaintiff be the real owner or not; or whether the premises in dispute be public or appropriated absolutely to public uses, are questions not permitted by law in possessory actions.....</p>	<p><i>ib.</i></p>

6. In an action of revendication to recover a slave, parole evidence is inadmissible, in order to make out plaintiff's title, to show that the slave was inventoried as part of their ancestor's estate by direction of defendant, who claims him by a written title from said ancestor. PAGE
Bradford's Heirs vs. Clark, 147
7. An action of rescission for lesion beyond moiety, does not lie in relation to the sale of slaves..... *ib.*
8. In a possessory action, where the defendant alleges in his answer that he purchased the disputed premises from the government of the United States, and assumes to call on it to warrant his possession, the court will disregard this part of the answer, and all the evidence that goes to establish or invalidate titles on both sides.....*Thomas vs. Baillie*, 410
9. The strict and legal inquiry in a possessory action is, "was the plaintiff the actual possessor, as alleged by him, and did the defendant disturb him and take possession."..... *ib.*
10. In a possessory action, when the judgment describes the contested premises with sufficient accuracy to enable the sheriff to execute a writ of possession, accompanied with a copy of the judgment, without exercising a dangerous discretion, the judgment will not be disturbed..... *ib.*
11. But in a possessory action, when the premises in contest are so vaguely described in the pleadings that they cannot be designated with any certainty, and the verdict and judgment are general, "that the plaintiff recover the possession of *the land sued for*," they will be set aside as being too vague, and the case remanded.....*Williams vs. Kelso*, 406

AFFIDAVIT.

1. An affidavit setting forth that certain depositions taken in another suit, to which the plaintiff was a party, but not between the same parties, is insufficient to obtain a new trial on the ground of newly discovered evidence.....*Ingram vs. Craft*, 82
2. Where a person swears, "to the best of his knowledge and belief," it is sufficient, and the addition of this qualification does not detract from the strength of the oath.....*Stoker vs. Leavenworth et al.*, 390
3. No affidavit to disprove the allegation for the removal of a cause to the United States District Court, will be admitted..... *ib.*

AMENDMENT.

1. Amendment correcting an error in the petition, by describing certain timbers in a house frame to be *poplar* instead of *walnut*, as originally stated, does not require an answer.....*Spotts vs. Lange & Longuepe*, 182

AMICABLE COMPOUNDERS.

1. In cases submitted to referees, *without* granting them the power to act as amicable compounders, the court may revise and rectify any errors contained in the award rendered by them..... *Davis vs. Leeds*, 471
2. When a cause is submitted to referees, with power to act as amicable compounders, their award, rendered in pursuance of the submission, and made in relation to the matters actually referred to them, is without amendment, revision or appeal. *ib.*
3. The award of amicable compounders, which has no relation to the matters in dispute submitted to them, is absolutely null and void ; and when their acts show dishonesty, gross misconduct, want of due regard to well settled principles, or extreme partiality in rendering their award, these will be good grounds for setting it aside..... *ib.*
4. Amicable compounders are not required to determine according to strictness of law, but are authorised to abate something of this strictness in favor of natural equity..... *ib.*
5. The approval and formalities required in the homologation of an award, are only intended to make it executory, and not for the purpose of an examination on its merits..... *ib.*
6. The law providing for submitting causes to amicable compounders, whose award, if not impeached, is not subject to revision by the courts, is not unconstitutional..... *ib.*

APPEAL.

1. Where an appeal was taken from a pariah in the Fourth Judicial District to the Eastern District of the Supreme Court at New-Orleans, and made returnable on the first Monday in January, when there was time to have returned it to the November term preceding : On motion of the appellee, the appeal was dismissed, as being irregularly taken.
Murphy vs. Besout, 14
2. An agreement of the appellee endorsed on the record, that the cause be postponed to the next term for trial, does not amount to a waiver of his exception to the irregularity of the appeal. *ib.* 14
3. In an appeal where security is given merely and expressly for costs, the execution of the judgment below is not suspended thereby ; it is not a suspensive but merely a devolutive appeal.
Groun et als. f. p. c. vs. Abal's Executors, 17
4. An injunction bond given at the inception of the suit, cannot be cumulated with the appeal bond given in the same suit on the appeal..... *ib.*

	PAGE.
5. A citation of appeal issuing without the seal of the court from whence it issued, is not sufficient, and the appeal will be dismissed.	
<i>Campbell, Ritchie & Co. vs. Karr,</i>	70
6. The signature of the clerk to the writ of citation is incomplete without the signature of the court, which makes it evidence.....	<i>ib.</i>
7. Without a sufficient citation in the first instance, the appellate court cannot take cognizance of a case, and must dismiss it.....	<i>ib.</i>
8. Where the wife was sued as heir, together with her husband, and the citation of appeal is directed to her alone, and only served on the husband: <i>Held</i> to be insufficient, and the appeal dismissed for want of legal citation.....	<i>Lenoue vs. Read et al.</i> 112
9. Where the record is not filed in the Supreme Court on the return day thereof, and no application is made to the court for leave to file it after that day, the appeal will be dismissed on motion.....	<i>Pond vs. Horton,</i> 176
10. The service of citation without the petition of appeal, is defective and insufficient. The Code of Practice, articles 581-2, expressly require the service of both.....	<i>Tuliaferro vs. King et al.</i> 361
11. When the service of the process of appeal is defective and insufficient, the appeal will be dismissed on motion of the appellee.....	<i>ib.</i>
12. Where two judgments are rendered in the same case, and the last is appealed from and decided to be a nullity, the right of appeal on the first judgment is suspended until the decision takes place, and an appeal may be taken within a year from that period, although more than a year has elapsed since signing the judgment appealed from.	
<i>Flint, Syndic vs. Cuny et al.</i>	379
13. Where an appeal bond is executed for one-half more than the amount of the judgment appealed from, and filed within ten days after the rendition of such judgment, the appeal is suspensive as well as devolutive.	
<i>Bridge & Vose vs. Merle & Co.</i>	446
14. The jurisdiction of the appellate court attaches, as soon as the appeal bond is filed, and the court <i>a qua</i> has no longer authority to take any steps in the case, except such as are necessary to transmit and bring up the record.	<i>ib.</i>
15. An appeal must be made returnable within the next term of the Supreme Court, if there be time to cite the appellee; if not, then to the subsequent term thereafter; but the judge <i>a quo</i> cannot, by a second order, extend the return day of the appeal, on the ground that the first day fixed is not a judicial day.....	<i>ib.</i>
16. When the term to which a cause is made returnable fails, the appellant may well file the transcript at the next term, within the <i>three judicial days after the return day</i> ; but the citation must be regular to the return day, and the service in due time.....	<i>ib.</i>

17. The Supreme Court, in its discretion, will refuse damages as for a frivolous appeal, even when the grounds of defence are untenable, and when the principles upon which they rest, have been settled by previous adjudication.....*Barbarin vs. Daniels*, 479
18. When the record furnishes no point, on which the appellant could reasonably hope to obtain the reversal of the judgment on appeal, it will be affirmed, with ten per cent. damages and costs.....*Menard vs. Cox*, 167
19. The service of citation of appeal, on the attorney at law of the appellees, when it is admitted the latter are residents of the parish where suit is brought, is illegal, and the appeal will be dismissed.
Petit et als. vs. Drane, 483
20. Where the judgment appealed from is not signed, the appeal will be dismissed with costs.....*Wright vs. McNair et als.* 512
21. The certificate of the clerk, that the record contains "a true copy of all the proceedings, as well as of all the documents filed in the suit," is insufficient to enable the court to examine the case on its merits, and the appeal will be dismissed.....*Police Jury vs. Menard*, 537
22. When the judgment of the court *a qua* is amended on appeal, although both parties asked and obtained an alteration, the appellee will be required to pay costs in both courts.....*Hilligsberg vs. Holmes*. 565
23. Where there is no good and substantial cause for an appeal, it will be considered as frivolous and taken for delay. In such cases, the judgment appealed from will be affirmed, with ten per cent. damages.
Chalaren vs. Vance, 571

APPELLANT AND APPELLEE.

1. The appellee may ask for an amendment of his judgment on the day preceding the hearing of the case, or at any time before it is called for trial. The circumstance of the hearing and trial coming on soon afterwards without opposition, cannot deprive the appellee of his right to the amendment asked for in due time.....*Greenfield vs. Manning & Wife et als.*, 56
2. According to the 883d article of the Code of Practice, the appellant has three days grace, within which to file the record, after the return day of the appeal, or on cause shown within this period, he may obtain further time to bring it up.....*Griffith et al. vs. Miner*, 344
3. The three days, after the expiration of which the appellee is entitled to the clerk's certificate to that effect, if the record is not filed or cause shown, are *days of grace*, within which the applicant must file the record or show cause to the contrary..... *ib.*
4. After the expiration of the three days of grace, if the record be not filed or cause shown, the appellee has three alternatives: he may obtain the

- clerk's certificate and proceed to the execution of his judgment, or he may file the record and have judgment affirmed, and lastly have the appeal dismissed..... *Griffith et al. vs. Miner*, 344
5. But the appellant may bring up and file the record after the expiration of the three days of grace, and without showing cause, if the appellee has not availed himself of any of the alternatives allowed him within the three days..... *ib.*

ATTORNEY AT LAW.

1. An attorney at law, who has obtained a judgment for his client, is not thereby authorised to receive a note and mortgage in satisfaction of said judgment..... *Greenwell & Wife vs. Roberts et als.* 63
2. A note and mortgage executed for the purpose of discharging a certain judgment, and made to the attorney of the plaintiff in the judgment, who shows no special authority to receive them in discharge thereof, will be declared illegal and null..... *ib.*
3. An attorney at law who receives, or is to receive a per centage on the amount of money he recovers, or a stipulated fee, is a competent witness to testify in his client's cause, and is not thereby disqualified on the score of interest, when that interest consists in his *honorarium*.
W. & D. Flower vs. O'Conner, 198
4. Attorneys at law are not inhibited from stipulating for a commission or per centage on collections made by them, and such bargains do not disqualify them from testifying..... *ib.*

ATTORNEY IN FACT.—SEE MANDATE.

ASSIGNMENT AND TRANSFER.

1. Where a person assigns and transfers a surety debt, for a consideration expressed therein, subrogating his assignee to all his rights, and authorising him to recover the debt by all legal means: *Held*, that a discharge given by the assignee to the debtor, in pursuance of the assignment, was valid against the assignor and his vendee, even when the debt was not novated by the assignment, and never paid to the assignee.
Andrus et als. vs. Chretien, 318

AUCTIONEER.

1. It is the duty of auctioneers to receive the conditions of sale in writing, from the vendor, and to read and proclaim them in a loud and audible voice to the by-standers, and invite bids in conformity therewith.
Hawkins vs. Brown et als. 417

BAIL.

1. Where a surrender is made of the accused, into the custody of the law, even after forfeiture has been entered, and the State avails itself of it by trying the criminal, the bail are entitled to be discharged.

State vs. Hay et als. 78

2. When the principal is tried and acquitted, before judgment for the recovery of the forfeited penalty or failure to appear at the first term, the bail will be discharged. *ib.*

BANK DIRECTORS.

1. The board of directors of the Commercial Bank of New-Orleans is required, by its charter, to consist of thirteen members, eleven to be chosen by the ordinary stockholders and two by the City Council, the city also being a stockholder: *Held*, that according to the charter there is no distinction amongst the directors in the board of which they are all members.

Prieur & Labatut vs. President and Directors of the Commercial Bank, 509

2. When certain directors of a bank are refused by the majority to exercise the rights in the board appertaining to their office as directors, the court will award a *mandamus* commanding that the prohibited directors be restored the exercise of their rights. *ib.*

BANK CHECK.

1. Where the cashier of a bank refuses to pay a check for want of funds of the drawer, but at the same time advances the money to the bearer, it will be presumed the cashier paid his own money as a loan, which will authorise him to recover, in a personal action in his own name, against the borrower. *Menard vs. Cox,* 167

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. According to the act of the legislature, passed the 13th March, 1827, concerning *protests of bills and notes*, whenever the notary certifies that, after diligent inquiry for the residence of the party intended to be charged by notice, he is unable to find it, and has lodged the notice in the nearest post office, addressed to him at the place where the contract was made, it is deemed equivalent to personal notice. *Preston vs. Dayson et als.* 7

2. The holder of a bill or note ought not to avail himself of the ignorance of the notary as to the residence of the endorsers, in giving them notice of protest; if he knows, he must disclose their residence, or his neglect will discharge the endorsers. *ib.*

3. Error and want of consideration in executing a note, and a mortgage to secure it, are sufficient causes and grounds on which to sustain an injunction against an order of seizure and sale on such note and mortgage.
Geenwell and Wife vs. Roberts et als. 63
4. The consideration of a note and mortgage, and the fact charged that they were executed in error, may be inquired into in an injunction to stay an order of seizure and sale; and if true, this summary proceeding will be declared illegal and the injunction perpetuated..... *ib.*
5. The possession of a joint note by one of the drawers, with a receipt of payment by the holder or possessor endorsed on it by the person entitled to receive it, is *prima facie* evidence of the liability of the other drawer to refund one-half of the note.....*Ingram vs. Croft,* 82
6. The rule that an acceptor of a bill is bound to show, not only the drawing and acceptance of the bill and its payment, but that it was put in circulation after acceptance, and that the drawer had no funds in his hands, applies only to cases where the acceptor declares upon a bill of exchange against the drawer.....*Bell vs. Norwood, Administrator,* 95
7. In an action on an account current, founded on a long course of commercial transactions between the parties, in which payments are charged for sums paid to take up drafts or bills accepted by the plaintiff, the possession of the draft by the acceptor is *prima facie* evidence of the payments charged in the account, and may be given in evidence in support of items in the general account..... *ib.*
8. Where the day of payment of a note is past, at the time of its transfer, it is a sufficient warning to whoever receives it, that the maker may have some just reason to withhold payment, as he has a right to any equitable defence after the transfer, which he might have successfully urged before.
Burroughs vs. Nettles, 113
9. A note payable on demand, may be sued on immediately or pleaded in compensation..... *ib.*
10. Where the payee of a promissory note payable to order, transfers it in writing on the back of the instrument for twenty per cent. discount, it will be considered a sale, not an endorsement, at the risk of the purchaser; and such a contract is aleatory and not usurious.
Romero et als. vs. Segura, 307
11. The holder of a promissory note payable to order, and endorsed in blank by the payee, is entitled to recover on it; it being in the nature of a note payable to bearer.....*Walsh vs. Wells,* 337
12. An erased credit on a note in possession of the creditor, is not conclusive proof of payment, but may be repelled by other proofs or presumptions, to show it was endorsed on the note erroneously.....*Benson vs. Mathews,* 356

13. The moment a bill of exchange is endorsed by the payee to a partnership firm, it becomes the joint property of all the partners.

Stevenson vs. Shields, 433

14. When the original payee is in possession of a note, on which his name is endorsed in blank, no proof of a re-transfer is necessary to enable the holder to recover.....*Barbarin vs. Daniels*, 479

15. Where the maker of a note died on the last day of grace, the notary, on calling at his domicile, being informed of his death, protested the note for non-payment, and notified the endorser thereof: *Held*, that there was not a proper demand of payment sufficient to bind the endorser.

Toby vs. Maurian, 493

16. Demand must be made on the maker of a bill or note, or on his heirs or legal representatives, if he be dead, or the impossibility of making any demand must be shown, before a recovery can be had of the endorser..... *ib.*

17. The endorser of a note is not entitled to relief, on the ground of error or fraud, because the previous endorsement is a forgery committed by the drawer, unless he shows that such error was caused by the plaintiff, or that he participated in the fraud.....*Olivier vs. Andry*, 496

18. Whether the endorsement of a note was made for the accommodation of the drawer, or taken in the regular course of business, the holder can look to his immediate endorser, even if the endorsement preceding it is a forgery..... *ib.*

19. Every endorsement is essentially an original contract, equivalent to drawing a bill in favor of the holder, on the acceptor or obligor..... *ib.*

20. A note given in part payment of a contract for erecting certain buildings, secured by a mortgage on the ground, is negotiable, and it is no defence against it, either in the hands of the original or subsequent holder, that the buildings were not completed according to contract.

Chalaron vs. Vance, 571

21. The paraph of the notary *ne varietur* on a negotiable note, does not in any manner change the nature of its negotiability..... *ib.*

COLORED PERSONS.

1. Where colored persons have been treated with as free, in a certain transaction or compromise, their freedom cannot afterwards be questioned by the other party with a view of avoiding the contract, on the ground that they were slaves; much less for the purpose of depriving them of the common privilege of all parties to a contract, that of contesting its validity on the score of error and fraud.

Grouniz et al., f. p. c. vs. Abat's Executor, 17

COMMISSIONS.

PAGE.

1. Where creditors agree to allow a syndic five per cent. commission, on the *real amount* he may have in his hands in the course of his administration, he is only entitled to a commission on the *amount of the moneys actually received* by him, and not on the amount of notes or property which came into his hands,.....*Prudhomme, Curatrix vs. Vienne's Estate*, 362
2. By the act of 1817, the commission of syndics cannot exceed five per cent.; and if the first syndic is allowed full commissions on the property which came into his hands, his successor to whom it is delivered for final distribution, would be entitled to nothing. *ib.*
3. The 1676th article of the *La. Code*, relates only to executors, and restricts their commission to two and a half per cent. on the amount of the inventory, when they have had *seizin* of the whole estate. *ib.*
4. Where the plaintiff has been allowed two hundred and fifty dollars, as a referee to adjust the accounts of an estate, he cannot recover of the syndic a commission on the amount of the estate so adjusted, when there is no evidence of any extraordinary services having been rendered by him.
Powell vs. Sinnott, 450

COMMUNITY.

1. Property which belongs to the matrimonial community of acquests and gains, may be seized and sold for the debts of the surviving partner, after the dissolution of the marriage, so far as the interest or one undivided half of the survivor is concerned, when no proceedings are had before the levy or seizure to make partition among the heirs.....*Cooney's Heirs vs. Clark*, 156
2. A community of acquests and gains, as such, ceases to exist at the moment of the death of one of the partners, with all the legal effects resulting from it. Each party is seized of one undivided half of the property composing the mass; and the surviving party cannot alienate the share not belonging to them.....*Broussard vs. Bernard et als.*, 216
3. If the survivor of a community of acquests and gains continues to administer it without provoking a partition, and is tacitly permitted to enjoy the common estate, he will be considered, except in cases where he may have a legal usufruct, as intermeddling, and his responsibilities will be those of a *negotiorum gestor*..... *ib.*
4. Property purchased by the husband after the dissolution of the community, by the death of his wife, becomes his sole property; but he is accountable for one half of the net revenues derived from the common property, after the death of his wife, and up to the time of making the inventory..... *ib.*

COMPENSATION.

1. A claim on a commercial firm, cannot be pleaded in compensation or set off to a demand by one of the partners against the defendant.
Walsh vs. Wells, 337
2. Evidence of a claim in compensation and reconvention, will be rejected when the demand is not equally liquidated with the claim of the plaintiff.....*Fagot et als. vs. Porche, 562*
3. The liquidation of a partnership claim cannot be pleaded in compensation or reconvention, against a demand on a note of hand..... *ib.*
4. The absence of all connexion between two demands, is an insurmountable objection to a demand in compensation or reconvention..... *ib.*

CONTRACTS.

1. Where a contract is entered into while the party was a *femme covert*, and some act is done by her after she became a *femme sole*, by which she ratified it, it will be binding on her.....*Tucker vs. Liles, 76*
2. So where the defendant is sued on her note, executed while a *femme covert*, for part of the price of a tract of land, and she retains possession of the land after her husband died, it will be considered a ratification of the contract and binding on her..... *ib.*
3. Where the question is presented, whether a workman who sues on a contract for work and labor, can give evidence of the work really done and recover its value, although the job was not completed according to contract when the employer received the work in an imperfect state, and when sued on the contract, demands damages in reconvention for delay in doing the work, and for not having performed it in a workmanlike manner: *Held*, that this case is similar to that of *Loreau vs. Declouet*, 3 *Louisiana Reports*, 1; and that the evidence is admissible, and the employer having received the work, is bound to pay the value in the condition it is delivered.
Dyer vs. Seals, 131
4. The captain of a steam-boat, owned by several persons including the captain, has authority to contract for freight to be carried according to the usual trade of the boat; and all the owners are bound by such contract, even without their assent given.....*Porter vs. Curry et als. 233*
5. The captain as agent of a steam-boat, may make contracts to take effect *in futuro*, to carry freight according to the usual course of trade of said boat, which is binding on the owner..... *ib.*
6. Where the captain of a steam-boat contracts to carry certain freight at a future day, between the well known *termini* of his voyage, and fails or

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- violates such contract, the owners of the boat are liable in damages, for all the loss sustained.....*Porter vs. Curry et als.* 233
7. A workman engages or contracts to furnish good work, but a merchant is not so bound.....*Barclay vs. Conrad et als.* 261
8. The provisions of the Code of Practice, article 72, relating to the discussion of property does not apply to contracts made before its enactment.
Guidry et als. vs. Rees, 278
9. The execution of a contract, according to its terms, and the intention of the parties, is more consonant to justice, law and equity, than the rescission of it and a condemnation in damages, when the contract remains entire, and there is no change in the situation of the parties.
Melançon's Heirs vs. Duhamel et als. 286
10. A bill of sale, executed in Kentucky, and valid under the laws of that state, which expresses the sale to be made for a *valuable consideration*, without fixing any price, of certain slaves in Louisiana, will be tested by the laws of the place where the contract was made, and being valid there, is good here as between the parties, although not made in conformity to the laws of this state.....*Hall vs. Mulhollan, Executor,* 383
11. A contract valid by the law of the place where it is made, as a general principle, is valid every where..... *ib.*
12. The signal for steam made by the captain of a vessel, on entering the mouth of the Mississippi river, does not confer on him the contract of towage with the first tow-boat coming along side. Up to the time when the ship is actually taken in tow, and the voyage commenced, the captain of the vessel is at liberty to change his mind and employ another boat.
Clark et als. vs. Gifford et als. 524

COURT OF PROBATES.

1. The Court of Probates will not entertain jurisdiction of a suit, against a curator of an estate, to recover the property which it is alleged has been irregularly sold, and especially, when the purchasers are not made parties.
Everett vs. McKinney & Wife, 375
2. The Probate Court cannot inquire directly into the title to real estate, though there are cases in which it may be done incidentally..... *ib.*
3. It is not enough to allege, that a defendant is curator of an estate, to give jurisdiction to the Court of Probates of the subject matter, not in itself of probate jurisdiction..... *ib.*

CURATOR.

1. The person making opposition to an application for the curatorship of a vacant succession, must state in writing the reasons why he claims the

office in preference to the person demanding it, and that he has a better right than the party claiming the appointment, otherwise his opposition will be rejected with costs.....*Chew et als. vs. Flint, Curator, &c.* 395

2. A special agent or attorney in fact, of one or more creditors, cannot claim the curatorship of a vacant succession, over other creditors or strangers. *ib.*

3. A transferee of claims against a succession for collection, is but a mandatory; and if the transfer is simulated, that is, a mandate in disguise for the purpose of obtaining a curatorship, it cannot operate to the prejudice of *bonâ fide* creditors..... *ib.*

4. The law requires applications for curatorship of vacant successions to be published in the gazette, as well as a notice at the door of the court house, and it is made the duty of the judge to make these publications. *ib.*

5. Publication of applications for curatorships is to operate as a constructive notice to all persons having a right to make opposition, and as in all cases of constructive notice, it must be strictly proved..... *ib.*

6. An entry on the minutes of the Probate Court, stating the fact, that a publication of an application for a curatorship was made, is not evidence of the fact, as relates to persons to be effected by such notice..... *ib.*

7. The party claiming the benefit of a publication of an application for a curatorship, is bound to show it was duly made..... *ib.*

8. The curator *ad hoc*, appointed at the institution of suit, is not entitled to a fee or an allowance which is to be taxed in the costs of suit and paid by the party cast. If he be an attorney, he may claim a fee as for professional services, or be allowed a remuneration for his services, to be paid in either case by the person, or out of his funds, whom he represents.

Hewet & Co. vs. Wilson et als. 71

9. The act of the 11th March, 1830, abolishing the office of curator *ad bona* and *ad litem* to minors, does not apply in cases where curators were appointed before the promulgation of the act. If the first curator is removed, another must be appointed, although since the general law abolishing the office.....*Saulet vs. Girard*, 559

CUSTOM.

1. Customs result from a long series of actions constantly repeated, which by such repetition, and by uninterrupted acquiescence, acquire the force of a tacit and common consent.....*Broussard vs. Bernard et als.* 211

2. The particular custom "*that the community of property continues after the death of one of the partners, until inventory is made,*" is required to be proved by other partitions and divisions, that may have been made in the same place, and that it has prevailed without interruption. *ib.*

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3. The establishment of a custom necessarily admits proof, other than that required to establish laws *Broussard vs. Bernard et als.* 211
4. Parole evidence is inadmissible to prove the customs of a country..... *ib.*
5. The books and records in the parish judge's office are legal, and the proper evidence to prove a particular custom, in relation to the continuation of the community, after the death of one of the partners, until inventory is made. *ib.*
6. Evidence consisting of extracts from the *procès verbal* of commandants and parish judges in Attakapas, for a long series of years, in which the phrase "*qfin defaire cesser la communauté*" is used in the caption to inventories, with other phrases of similar import, is *insufficient* to prove the existence of a custom in such place, that a community of acquets and gains continued between the surviving husband and the heirs of his deceased wife, until inventory is made..... *Broussard vs. Bernard et als.* 216
7. No usage or custom of steam-boats and tow-boats, that the first coming along side of a ship on a signal made by her for *steam*, has thereby an absolute contract to tow the ship at an established rate, according to a custom and usage of the tow-boats, is *binding*, when such custom has only prevailed five or six years, among those having an interest in establishing it..... *Clark et als. vs. Gifford et als.* 524

DAMAGES.

1. Where there is no evidence of damages having been sustained, none can be recovered against a warrantor..... *Smith vs. Corcoran et als.* 46
2. The measure of damages and just criterion of loss to the owner, is the value of his property at the place of destination, after deducting freight..... *Porter vs. Curry et als.* 233
4. In an action for false imprisonment and damages under a *ca. sa.*, which was quashed for having illegally issued, the defendant may show in justification and mitigation of damages, by argument and reference to the decisions of the Supreme Court, that the judgment quashing the writ is erroneous, when at the trial such judgment has not become *res judicata*. ,
Escuriz vs. Daboval, 575

DEBTOR AND CREDITOR.

1. Credits or other writings not signed, endorsed on the back of a note or act, which is in the possession of the creditor, and tend to liberate the debtor, and are crossed out or erased, must be considered as entitled to credit..... *Benson vs. Mathews*, 356
2. An erased credit on a note, in possession of the creditor, is not conclusive proof of payment, but may be repelled by other proofs or presumptions, to show it was endorsed on the note erroneously..... *ib.*

3. So, where two credits, one of four hundred dollars, and one of three hundred and eighty dollars, were endorsed on a note in the possession of the creditor, and the former was erased, both endorsements appearing to be made on the same day: *Held*, that the erasure was proper and the credit erroneously endorsed, when, on weighing the presumptions arising from all the circumstances of the case, they preponderate in favor of the creditor.

Benson vs. Mathews, 356

DEMAND.

1. No recovery can be had of the endorser, until demand of payment has been made on the maker of the note, or on his heirs or legal representatives if he be dead, unless the impossibility of making such a demand is shown..... *Toby vs. Maurian*, 493

DEPOSITION.

1. When the notice to take a deposition is not given in full time, as required by law, yet when the party sends her attorney to the commissioner, who appears and objects to taking it on the ground of defective notice, this fact will render the notice sufficient.

Beale and Wife vs. Brandt and Wife, 583

2. Where the name of a witness is written *C. Swabine* in the affidavit for the commission, and *Catherine Swab* in the deposition, the discrepancy in the names will not vitiate the deposition, when it is in other respects taken according to law..... *ib.*

3. The law does not require a commissioner, before whom a deposition is taken, to reduce it to writing personally. It is sufficient, if not written by the witness, that it be reduced to writing by any indifferent person..... *ib.*

4. When a deposition is accompanied by the certificate of the commissioner, that it was taken by him, and signed and sworn to before him, it is a sufficient *procès verbal* of the manner of taking it..... *ib.*

DEPOSIT IN COURT.

1. Where the plaintiffs and intervening parties unite in a prayer, that the defendant be condemned to pay the sum demanded, and his liability is established, he will be required to deposit the money in court, to abide the final decision between the claimants.

Hermann & Son vs. Louisiana State Insurance Company, 502

DISCUSSION.

1. The Civil Code of 1808, art. 44, p. 462, and p. 430, art. 10, provides, that the third possessor of mortgaged property, who is not personally liable for the debt, may require the property in possession of the original debtor,

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- to be first discussed and sold, before coming on him, if the debtor is not situated in too distant a part of the State.....*Guidry et als. vs. Rees*, 278
2. According to the Code of Practice, art. 72, the discussion of property, not situated within the jurisdictional limits of the tribunal where payment is to be made, is disallowed..... *ib.*
3. It is not necessary that the money required to defray the expenses of discussion of property be tendered at the time of filing the plea; it is sufficient if the money be deposited in court, in pursuance of an order directing it to be done within a specified time..... *ib.*
4. The provisions of the Code of Practice, limiting the right of discussion to property within the jurisdictional limits of the tribunal where payment is to be made, does not apply to contracts made before its enactment..... *ib.*
5. The Code of Practice has re-enacted the same general rules in relation to the discussion of property by creditors having a general mortgage on the property of their debtors, as was provided by the act of 1817, requiring them to proceed against the property last sold, and ascending to the first until their claims be satisfied.....*Patin et als. vs. Prejean et als.* 301
6. The means by which a minor's rights against the property of his tutor are to be enforced, are always in the power of the legislature. In requiring him to discuss property last alienated, before coming on that previously sold, although the law was enacted after his mortgage attached to the property of his tutor, yet it was within the constitutional power of the legislature to pass it..... *ib.*

DIVORCE.

1. A suit for a separation from bed and board, is in the terms and meaning of the law, an *action of divorce*.....*Savoie vs. Ignogoso*, 281
2. The exception to the rule of evidence contained in the 2260th article of the Louisiana Code, by the third section of the act of 1827, relative to divorces, is not restricted to either species of divorce, but applies to both. *ib.*
3. The action for a separation of bed and board, in all cases leads to a divorce *a vinculo matrimonii*..... *ib.*
4. The children and relatives of the plaintiff, are competent to testify in her behalf in an action for a separation of bed and board..... *ib.*

ENDORSER.—SEE BILLS OF EXCHANGE AND PROMISSORY NOTES.

EVICITION.

1. If in case of eviction of part of the thing, the sale is not cancelled, the value of the evicted part only is to be reimbursed according to its estimate, proportionably to the total price of the sale.

Smith vs. Corcoran et als. 46

2. Where judgment of eviction is obtained against the purchaser of a tract of land, while suit is pending for the price, and the purchaser calls the plaintiffs (his vendors) in warranty, to protect his title, and at the same time pleads the eviction, asks a rescission of the sale and a discharge from the contract; when there is no evidence of an actual dispossession or ouster of the defendants, either forced or voluntary, the plaintiffs will recover the price, on preventing the execution of the judgment of eviction, by tendering to the defendants and vendees, a renunciation of all the benefits and advantages under it, by the person who obtained it.

Melançon's Heirs vs. Duhamel et als. 286

3. The third possessor who is evicted, is entitled to recover of his vendor and warrantor, the value of his improvements put on the evicted premises, at the period of eviction.....*Babin's Heirs vs. Winchester,* 460

EVIDENCE.

1. The notary's certificate, stating that due diligence was used to find the residence of an endorser, intended to be charged by notice of protest, but in vain, and that the notice was deposited in the post-office, addressed to him, must be taken as *prima facie* evidence of these facts.

Preston vs. Dayston et als. 7

2. The nature and degree of diligence used to find the residence of the party, on whom notice of protest is to be served, may be inquired into, and if in point of fact, due diligence was not used to obtain the necessary information, the presumption arising from the notary's certificate, will yield to contrary evidence.....*ib.*

3. The statute of the 13th March, 1827, concerning protests of bills and notes, does not change the rule requiring due diligence to be used, but provides a new mode of proof of such diligence..... *ib.*

4. Evidence offered to prove the identity of a tract of land, and to correct errors in its description, is properly rejected as superfluous, when its identity is admitted in the pleadings.....*Smith vs. Corcoran et als.* 46

5. In a suit by a firm for the restitution of stolen goods in damages, where the wife is a party plaintiff, the acts and declarations of her husband in relation to the matters in contest, in which he took an active part, are admissible in evidence, as forming a part of the *res gesta*. He must be regarded in this case, as representing his wife with the consent of her partner.....*Hewet & Co. vs. Wilson et als.* 71

6. Where drafts are charged in an account current as paid to *Guay*, and those offered in evidence are payable to *Gray*, and the amounts and dates of the drafts correspond with those charged in the account, they will be rendered in evidence.....*Bell vs. Norwood, Administrator,* 95

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7. The repossession of a note, once specially endorsed by the payee, is not evidence of title to it, but it is if the transfer is made in blank.
Bell vs. Norwood, Administrator, 95
8. Parole evidence to prove an agreement to pay interest at ten per cent., is clearly illegal and inadmissible..... *ib.*
9. Accounts and letters relative to sales made by the plaintiff, and rendered to the defendant, anterior to the date of the first item of the account sued on, are admissible in evidence, because it may also be shown, that a subsequent settlement took place, and the moneys arising from such sales were accounted for..... *ib.*
10. In a suit by the transferee against the maker of a note, where the answer alleges fraud and collusion between the payee or transferor and the plaintiff, parole evidence of the acts of the former, is clearly admissible against the latter, if the collusion is established.....*Burroughs vs. Nettles*, 113
11. And where the jury are to pass at once on the plea of collusion, and acts of the transferor charged with colluding with the plaintiff, the evidence relating to these two points must be administered simultaneously..... *ib.*
12. The promise of the vendor of a slave, to rescind the sale on account of redhibitory vices, is admissible in evidence, in a suit between the transferee of a note and the maker, given for the price of the slave, to show the existence of redhibitory defects..... *ib.*
13. On the score of irrelevancy, the objection to evidence is seldom of any avail in the Supreme Court..... *ib.*
14. In an action of revendication for the recovery of a slave by the heirs, as forming part of their ancestor's succession, against the defendant, who holds the slave by written title from said ancestor, parole evidence is inadmissible to prove the defendant directed the slave in question to be inventoried as part of said succession, in order to make out plaintiff's title.
Bradford's Heirs vs. Clark, 147
15. Where parole evidence is offered with a view to defeat the defendant's written title to a slave, it should be rejected as inadmissible..... *ib.*
16. Where heirs claim certain slaves allotted to them in the partition of their ancestor's estate, the *procès verbal* of partition is admissible in evidence to show title on the part of the claimants.....*Cooney's Heirs vs. Clark*, 156
17. Parole evidence is inadmissible to supply defects in the sheriff's return, of proceedings under an execution, or where it contradicts the official return of the officer.....*Heirs of Kimball vs. Heirs of Lopes*, 173
18. The affidavit of the party is insufficient to establish the loss of a note, but it is admissible in evidence as the basis of other proof, either positive or circumstantial.....*W. & D. Flower vs. O'Conner*, 198

19. In a cross-examination of plaintiff's witness the defendant cannot require him to detail declarations of the defendant made out of the presence of the plaintiff, and which make evidence against him, or in favor of the defendant. *W. & D. Flower vs. O'Conner*, 198

20. In a petitory action, where the defendants, their vendors and warrantors pleaded, 1st. The general issue; 2d. Prescription, by thirty years uninterrupted possession; 3d. Prescription, by more than ten years possession under a *just title and in good faith*; 4th. Silence of the plaintiffs for more than forty years in not asserting their title; and in support of these pleas, offered the *testimony of witnesses* to prove and make complete their chain of title, which was objected to by the plaintiffs; 1st. Because the defendants having admitted in their pleadings, that they had a written title, must produce it, or account for its loss; 2d. Parole evidence cannot be received to prove title to land, or even its assessment for taxes; 3d. Because the object is to prove a reputation of title to land, which cannot be done, and being admitted: *Held*, that this evidence is illegal and inadmissible; and being admitted absolutely, the District Court erred, because it is to judge of the admissibility of testimony and cannot discharge itself from this obligation by transferring it to the jury. It must be satisfied that the best evidence cannot be had before it admits inferior..... *Davis's Heirs vs. Provost's Heirs*, 274

21. The record of a suit between other parties, evicting the third possessor, is legal evidence in an action by the third possessor against his vendor, to prove the fact of eviction, and the damage sustained by him in consequence thereof,..... *Key vs. Walker*, 297

22. Where the petition alleges the plaintiff was evicted by a certain suit between two other persons, and refers to it by name and description, it is a sufficient allegation to authorise the admission of the record in evidence, in an action against the vendor for damages..... *ib.*

23. It is not necessary that the vendor who is sued, had notice of suit and proceedings evicting his vendee, to authorise the admission of these proceedings in evidence against him. That matter may go to the effect of the evidence, but not to its admissibility..... *ib.*

24. Parole evidence is *inadmissible* to prove a verbal agreement to cancel a sale of slaves, or to establish or destroy title to slaves.

Andrus et als. vs. Chretien, 318

25. But parole evidence is admissible to prove collateral facts, such as that the seller took back certain slaves from the purchaser, and had them in possession, with the consent of the latter, in consequence of redhibitory defects, and to avoid litigation..... *ib.*

26. Parole evidence is admissible to prove the declarations of a vendor in relation to the redhibitory vices of slaves, at or before the sale.

Hawkins vs. Brown et al. 417

37. The conversations of by-standers at a probate sale, with a purchaser, by which he is apprised of redhibitory defects or vices in the property, before it is bid off, will not be received to exclude the legal warranty resulting therefrom, unless they go to establish the fact, that the redhibitory vice complained of, had been declared by the vendor.
Hawkins vs. Brown et al. 417
28. The crier's declarations at a probate sale, unauthorised by the vendor, are not admissible in evidence to show the buyer was thereby apprised of the redhibitory vices, before he bid for the property..... *ib.*

EXCEPTIONS.

1. A peremptory exception may be pleaded, after the cause has been remanded for a new trial.....*Williams vs. Bethany*, 92
2. According to the 420th article of the Code of Practice, an amendment of the answer, after issue joined, may be made by adding new exceptions, provided they be not of the dilatory kind..... *ib.*
3. So, in an action for the recovery of rent, on the lessee's holding over after the case has been remanded, he may oppose the exception, that after the expiration of the lease he tendered the possession of the premises..... *ib.*
4. The exception or plea that no amicable demand was made, must be specially pleaded, and in *limine litis*. It is too late to put in the exception after *contestatio litis*.....*Coon vs. Brashear et als.* 265

EXECUTOR.

1. The executor is bound to administer on all the property of a succession which is expressly declared in a will, by the testator, to form a part of his estate; even on property claimed by an adverse title, unless inhibited by competent authority.....*Grouniz et als. f. p. c. vs. Abal's Executor*, 17
2. Where an executor is appointed and directed in the will to sell the property of the testator, and deliver the residue of the proceeds to the heir, he is authorised to take possession and sell it without the seizin of the estate being expressly given.....*Dunlap vs. Bailey, Executor*, 368
3. The executor derives his power from the will; is primarily the representative of the deceased, and not of the creditors of the succession, when it is not shown to be insolvent; and he is required to account to the heirs and not to the creditors.....*Hall vs. Mulhollan, Executor*, 383
4. The executor, although he is a creditor of the estate he administers, has no right to withhold property or slaves found in the succession, from the vendee by a valid title, but which have not been delivered without some right or lien acquired in virtue of judicial process..... *ib.*

FACTOR AND AGENT.

1. The circumstance of a factor being the creditor of the consignor or owner, and the necessity of having his advances covered, will not, of itself, justify a sale below the limited price.....*George vs. McNeill et als.* 124
2. So, where twenty bales of cotton were consigned, the sales limited at nine and one-half cents, or *more*, and without further instructions, the factor or agent sells at seven and eight and one-half cents per pound; and it is proved that a higher price than that at which the cotton was sold, could not be obtained; and when it also appears that this was the highest market price obtainable at any time between the sale and the inception of suit, the price at which the cotton actually sold, is all the owner can recover..... *ib.*
3. In an action by the principal against his factor, to account and pay over a balance for merchandise sold on consignment, it devolves on the latter to show he has not received any money by the sale of the goods, or collected any of the debts, and to establish this to be the case, *without his fault*, in order to avoid being liable.....*Delpeuch vs. Dufart,* 533

FRUITS AND REVENUES.

1. The allowance made by the jury to the defendants, for their improvements show they were possessors in good faith; and consequently the plaintiff is not entitled to the fruits and revenues of the land.
Greenfield vs. Manning et als. 56

GUARANTY.

1. A letter of guaranty must be strictly construed, in order to charge the guarantor: so where A recommended B to the credit of C, and the latter made the advances to B and D as a firm, on the faith of tao guaranty: *Held*, that the guarantor is not bound thereby.
Bell vs. Norwood, Administrator, 95

HEIRS.

1. The heirs of the deceased wife, who dies without leaving descendants, have a right at once to demand her paraphernal estate, without waiting for a settlement and liquidation of the community of acquests and gains, with the surviving husband.....*Robin et als. vs. Castille,* 292
2. When the wife dies, her *heirs* are seized of all the effects constituting her separate estate, from the moment of her decease. *ib.*

HUSBAND AND WIFE.

1. Where the evidence establishes that the wife was in the habit, with the knowledge of her husband, and accustomed to make purchases for the

use of the family, and he did not object thereto, but had often paid such bills, he will be still bound to pay the amount of such purchases.

Chair vs. Villejoin, 276

2. Money received by the husband during marriage, on account of his wife, does not fall into the community, but remains her separate property. *Robin et als. vs. Castille*, 292

3. The wife, during the existence of the community between her and her husband, has a right to resume the administration of her paraphernal property..... *ib.*

INJUNCTION.

1. Where it appears that the plaintiff in execution, was prevented from making his debt out of the property seized, by the wrongful suing out an injunction, the surety in the injunction bond is liable in damages, for an amount not exceeding the penalty of the bond..... *Day vs. Martin*, 365

2. Although a judgment enjoined draws interest until paid, the claim of the plaintiff against the surety in the injunction bond, is for damages not liquidated, which do not carry interest, and cannot exceed the penalty of the bond..... *ib.*

INSOLVENT.

1. The acceptance of a surrender of property of an insolvent debtor, by the judge, vests all the debtor's rights in the creditors, which cannot be divested or set aside, unless by proceedings of a single creditor, had contradictorily with the mass of the creditors... *Morgan vs. His Creditors*, 60

2. Until a syndic is appointed, either by the court or the creditors, no motion or suit to dismiss the petition of the insolvent, can be made or tried. *ib.*

3. The ceding debtor, after surrender and appointment of syndics, has no longer any capacity to appear in court, in relation to the property surrendered..... *M'Intire vs. Whiting*, 271

4. But where a ceding debtor has a qualified property in goods, acquired after the surrender as bailee or carrier, which are seized by a judgment creditor, he has a right to move the court, and have the writ and seizure annulled and set aside..... *ib.*

5. Property belonging to the ceding debtor, at the time of the surrender, cannot be seized in execution by a judgment creditor, who is a party to the *concurso*..... *ib.*

6. The District Court, on motion by an insolvent debtor, has the right to quash an execution, which improvidently issues contrary to the order staying proceedings; the debtor, although incapable of appearing in court,

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in relation to the mass of property surrendered, was a party to the original suit, and might well make such a motion. *M'Intire vs. Whiting*, 271

7. An absconding debtor cannot apply for the benefit of the insolvent laws, and make a surrender of his property by *attorney in fact*. No man can swear by proxy, unless expressly authorised by law; and the attorney in fact cannot swear, that no part of the insolvent's property has been diverted to the injury of his creditors, which is essential to the affidavit.

Foucher vs. His Creditors, 425

8. The judge is not authorised to order a stay of proceedings, either against the person or property of an insolvent debtor, and to accept the cession, so as to bind all the creditors without a compliance on the part of the insolvent, with the essential forms of law..... *ib.*

9. A person owning a saw-mill and brick-yard, as an appendage to a sugar plantation, and selling the bricks and plank, does not constitute him a *trader*, within the meaning of the 6th section of the act of 1826, relating to forced surrenders of property..... *ib.*

10. A married woman, separated in property from her husband, and who is not even a public trader or merchant, has the right to claim the benefit of the insolvent laws, which authorise a cession of property for the benefit of creditors, by a debtor in embarrassed and insolvent circumstances.

Madame Gottschalk vs. Her Creditors, 436

INSURANCE.

1. Where A takes out a policy for *whom it might concern*, takes in a partner in the ownership of the vessel insured, and afterwards transfers the policy by special endorsement in his individual name to the plaintiffs, who show a total loss, payment of the loss to them, will liberate the underwriters. They contracted with A, and whether as principal or agent is immaterial.

Hermann & Son vs. Louisiana State Insurance Company, 502

INTERDICTION.

1. The law presumes certain formalities which must be pursued, in order to obtain a judgment of interdiction against a person above the age of majority..... *Babineau, Curator, &c. vs. Bendy & Dugat*, 248

2. The law presumes every person above the age of majority, capable of managing his own affairs, even deaf and dumb persons not excepted..... *ib.*

3. Where a person has not been interdicted in pursuance of law, but being deaf and dumb, and a curator appointed to manage his affairs, such curator cannot claim a legal mortgage on the real estate of another, who has intermeddled and collected moneys due said deaf and dumb person..... *ib.*

INTEREST.

PAGE.

1. When the sum found by the jury, was not liquidated at the inception of the suit, interest is not allowable by law. The law does not allow interest on unliquidated sums.....*Dyer vs. Seals*, 131
2. Where the verdict and judgment allows interest on an unliquidated sum, the appellee cannot avoid a reversal of the judgment and payment of costs, by filing in the Supreme Court, a *remittitur* of the interest so allowed..... *ib.*
3. Conventional interest, whether stipulated in *eo nomine*, or in the shape of a penalty, cannot exceed ten per cent.
Reynolds, Byrne & Co. vs. Yarrowburgh, 188
4. An error in calculating the highest rate of interest, by which it exceeds the legal amount of conventional interest, will not be considered as charging usurious interest.....*W. & D. Flower vs. O'Conner* 198
5. Usury may be shown even when not pleaded, if it appears from the petition or evidence offered by the plaintiff, that more than ten per cent. was stipulated..... *ib.*
6. A judgment stayed by injunction, draws interest until paid; but the claim of the plaintiff against the surety in the injunction bond, is for damages *not liquidated*, which do not carry interest.....*Day vs. Martin*, 365
7. A mortgage which, without reciting the interest, refers to and secures the payment of a note, is evidence of the principal obligation, and covers all the stipulated interest therein.....*Barbarin vs. Daniels*, 479
8. Where a note stipulated for ten per cent. per annum interest, and was made payable eighty-five days after date: *Held*, that the interest run from the date of the note, without any demand at maturity, until final payment..... *ib.*
9. The writing is not of the essence of an agreement to pay interest at ten per cent., but that the legislature only intended to exclude testimonial proof of such agreement.....*Cox vs. Mitchell*, 520
10. The defendant in an execution is subject to no interest, simple or compound, after the adjudication of his property, whether on a credit or for cash.....*Hilligsberg vs. Holmes*, 565
11. Judgment will be reversed where interest is allowed, on an unliquidated claim.....*Featherstone vs. Robinson*, 596

INTERROGATORIES.

1. A party who propounds interrogatories to be answered in open court, but neglects to have a day fixed, waives his right to have them taken *pro confesso*, if they be not answered.....*Compton et al. vs. Pearce*, 333

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2. Either party has the right of having his interrogatories answered in open court and in his presence. No order of court is necessary, as it is a right the law gives.....*Compton et als. vs. Pearce*, 333
3. The Code of Practice requires the answer to be made when both parties are in court, and as the answer is for the benefit of the party provoking it, he should take the means required by law, and have the day fixed..... *ib.*
4. In an action on the balance of account due, the plaintiff has a right to interrogate the defendant, touching the agreement of the latter to pay conventional interest.....*Cox vs. Mitchell*, 520
5. Where the defendant neglects to answer interrogatories annexed to the petition, the facts required to be disclosed, ought to be taken as confessed... *ib.*

INTERVENOR.

1. An intervenor in a suit commenced by attachment between the original parties, although he succeeds in obtaining judgment, cannot proceed on the attachment bond, against the surety for any supposed damages, because he is no party thereto.....*Raspillier vs. Brownson*, 231
2. There is no privity of contract between the intervenor in a suit already begun by attachment, and the surety in the attachment bond, and he cannot avail himself of the penalty..... *ib.*

JURY.

1. Where a witness swears falsely on a material point in a cause, the jury is authorised to disregard his testimony altogether.
Coon vs. Brashear et als, 285
2. The jury are the judges, whether a misstatement by a witness was wilful or material, and what degree of credit ought to be given to his testimony..... *ib.*

JUDGMENT.

1. Where a suit is brought against A, for illegally retaining possession of a note, and against B the obligor, included in the same suit, and judgment is asked against the first, to compel a surrender or payment of the note, and the latter also for its amount, the causes of action are different, and judgment may well be taken against the first, while the case is continued as to the latter.....*Regillo & Bryan vs. Lorente et als*, 140
2. The neglect or omission to record a judgment, within ten days after its rendition, under the recording act of March 28, 1813, does not render it a

nullity, so as to prevent its having the effect of a legal mortgage from the date of its registry, when recorded after the lapse of ten days.	PAGE.
<i>Gayle's Heirs vs. Williams's Administrator,</i>	162
3. When the defendant suffers judgment by default to be taken against him, it is a presumption, that by his silence he acknowledges the justice of the plaintiff's demand.....	<i>Lopes et als. vs. Bergel,</i> 178
4. Where the defendant does not deny the plaintiff's debt, but lets judgment go by default, this fact will be considered as a corroborating circumstance, which taken with the testimony of one witness, is sufficient proof of the demand to make such judgment final.....	<i>ib.</i>
5. A judgment rendered by a court of competent jurisdiction, between parties legally before it, cannot be questioned indirectly and collaterally.	<i>Broussard vs. Bernard et als.</i> 216
6. While a judgment remains in force and unappealed from, the rights of the parties are concluded by it, leaving to those under age their legal recourse.....	<i>ib.</i>
7. A judgment by default made final, will not be set aside for an answer to the merits, when the defendant can show nothing in his favor, but his own <i>laches</i> and their fatal consequences.....	<i>Small vs. Flint & Thomas,</i> 352
8. If a judgment be in itself vague and uncertain, it may be rendered certain by reference to the pleadings.....	<i>Williams vs. Kelso,</i> 406
9. According to the rules of practice in force in 1816, which was before the adoption of the Code of Practice, a judgment by default became final <i>ipso facto</i> by the lapse of three days; and reasons were not necessary to the validity of such a judgment	<i>Babin's Heirs vs. Winchester,</i> 460
10. A judgment by default, which becomes final by operation of law, does not require the signature of the judge to render it perfect and final...	<i>ib.</i>
11. Where a judgment was rendered by default, and signed according to law, after the cause was set down for trial and the defendant notified thereof, he cannot afterwards obtain relief, by having the judgment set aside, and the cause tried <i>de novo</i>	<i>Borée, f. m. c. vs. Kellar,</i> 500
12. Where the decision of a case depends wholly on matters of fact, and when, on an examination of the testimony, it warrants the verdict of the jury, the judgment rendered thereon will not be disturbed.	<i>Kimball & Lilly vs. Nicholson,</i> 529

JURISDICTION.

1. The judiciary act of 1789, while it gives to the federal courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction,

reserves to parties, in all cases, the right of a common law remedy, when the common law is competent to give it.....*State vs. Judge Watts*, 440

2. The states are prohibited from establishing courts, having cognizance of cases of admiralty and maritime jurisdiction, according to the course of proceedings in courts of admiralty; but if parties choose to sue upon their contracts, according to the rules of practice established by law in courts of general jurisdiction, instead of proceeding summarily, by motion or *in rem*, in the admiralty courts, there is nothing in the constitution which prohibits them. *ib.*

3. The adjustment of accounts among part owners of ships, relating to profits, is matter of chancery and not admiralty jurisdiction in England. *ib.*

4. Admiralty courts in the United States, may, in some cases, have ordered the sale of vessels, at the suit of part owners, but it does not follow, as a necessary consequence, that the state courts are without jurisdiction in the same matters..... *ib.*

5. So the part owner of a vessel, within the jurisdiction of the state courts of general jurisdiction, may institute suit therein, to compel a partition of his interests, and recover a balance for advances made, by a judicial sale or licitation of the vessel, even when the co-proprietor resides out of the state..... *ib.*

6. In a suit, claiming of the defendants the right to exercise an office withheld from them, the plaintiffs, with a view of securing the right to appeal, in case the judgment is adverse to their pretensions, may claim damages to an amount sufficient to give the appellate court jurisdiction.

Prieur & Labatut vs. President and Directors of the Commercial Bank, 509

LAW.

1. In a conflict of laws between two states, where a testator in Georgia bequeaths to certain of his slaves their freedom, and it is shown that the laws of Georgia prohibited the manumission of slaves, except by application to the legislature; in a suit in this state to recover their freedom under the will: *Held*, that the *bequest* in the will being made in contravention of the law of the state where the testator resided, is *null and void*; and that the slaves do not, *ipso facto*, become free under the will, when removed to this state.....*Mary, f. w. c. vs. Morris et als.* 135

2. The *Fuero Real* of Spain, was not in force in Louisiana, in 1816.
Broussard vs. Bernard et als. 216

3. The Spanish law having been in force in Louisiana until the repealing act of 1823, the court will recognise it in relation to cases arising under the government of Spain, without requiring it to be proved as a fact.

Bertuchaux vs. Bertuchaux et als. 539

4. The effect of laws is generally prospective; and if they have a retro-^{PAGE.}
spective effect in any case, the intention of the legislature must be clear and
express. It cannot command obedience to laws effecting the obligation of
contracts entered into before their passage.....*Guidry et als. vs. Rees*, 278
5. A right or title acquired under a contract, cannot be modified or
affected by any subsequent law of the legislature; but the remedy or
means given by law, to enforce those rights, are always in the power of the
legislature, who may extend or restrict them as circumstances may require.
Patin et als. vs. Prejean et als. 301
6. Statutes in *pari materia* should be construed together, in order to
ascertain the meaning of the legislator.
Gayle's Heirs vs. Williams's Administrator, 162
7. Prior laws are not repealed by subsequent ones, unless by positive
enactment, or clear repugnancy in their respective provisions..... *ib.*

LEGATEES.

1. Persons claiming as legatees under a will, cannot set up title to pro-
perty under an anterior sale and conveyance, which is expressly declared
in the will to form a part of the estate of the testator.
Grouniz et als. f. p. c. vs. Abal's Executor, 17

LETTING AND HIRING.

1. Where a person borrows the slave of another, to do a certain work for
him, and through his neglect or imprudent conduct the slave dies, he will
be bound to pay his value to the owner.....*Niblett vs. White's Heirs*, 253
2. So where A borrows the slave of B, to haul a load seven or eight
miles, and a storm comes on, and the borrower refuses to stop and take
shelter for himself and the slave, and the latter is lost, A will be answerable
to B in damages for the value of the slave..... *ib.*

MANDATE.

1. A mandatory is not considered to have exceeded his authority, when
he has fulfilled the trust confided to him, in a manner more advantageous
to his principal, than that expressed in his appointment.
George vs. McNeill et als. 124
2. A transferee of claims, against a succession for collection, is but a
mandatory; and if the transfer is simulated, that is, a mandate in disguise
for the purpose of obtaining a curatorship of the estate, it cannot operate
to the prejudice of *bond fide* creditors.....*Chew et als. vs. Flint, Curator*, 395

3. An attorney in fact, or special agent of one or more creditors, cannot claim the curatorship of vacant successions, especially over other creditors or strangers. *Chew et als. vs. Flint, Curator*, 395
4. The mere legal agent appointed to sell property by authority of law, has no powers but those conferred by law. *Hawkins vs. Brown et al.* 417

MASTERS OF VESSELS.

1. Where a passenger engages his passage on deck or in the steerage, and in consequence of continued intoxication and ridiculous conduct, is made the butt and ridicule of the other passengers, without the interference of the master of the vessel, the latter is not liable in damages for such treatment during the voyage. *Hessian vs. Ferguson*, 531

MASTER AND SLAVE.

1. Where offences are committed by slaves belonging to several masters, by their order, they will be liable as direct trespassers *in solido*.
..... *Hart & Co. vs. St. Romes et als.* 586
2. But where the slave of A, in company with the slaves of B, commit an offence, it is clear that A cannot, according to the *Louisiana Code*, be made responsible beyond the value of his slave, if he thinks proper to abandon him. *ib.*
3. After the master abandons his slave, he still retains a residuary interest, that if the sale of him produces more than the amount of the damages awarded, he is entitled to the surplus. *ib.*
4. The master is not *in mora* in making an abandonment of the slave until three days after the judgment. Until the judgment is *res judicata*, the party has not lost his right of liberating himself by abandonment; or if the abandonment becomes impossible by a fortuitous event, without the fault of the master, he is liberated. *ib.*
5. Where several slaves, belonging to different masters, commit a theft, the masters should be condemned to pay in proportion to the number of slaves respectively who were accomplices in the theft. *ib.*
6. So, where A was the owner of three out of five slaves concerned in a robbery, he is liable to pay three-fifths of the value of the stolen goods. *ib.*

MINORS.

1. A transaction entered into on the part of minors, duly represented and made according to the forms of law, will cure defects in a judgment which was not conclusive, and against which the minor might otherwise be relieved. *Groux et als. f. p. c. vs. Abat's Executor*, 17

- PAGE.
2. Where the curator *ad bona* of a minor above the age of puberty, purchased property for the use and in the name of his ward, at the sale of his father and mother's estate, and during his minority, in an action of partition, he is charged with his share of the estate thus purchased and received, by a judgment of the Probate Court: In an action to set aside the purchase, as having been made without his concurrence and consent: *Held*, that he was precluded by the judgment of the Probate Court so long as it stood unreversed..... *Groux et als. f. p. c. vs. Abat's Executor*, 17
3. Where the price of minors' property has been received by their tutor, and placed to their credit on a tableau of distribution of the testator's estate, which is homologated by a judgment of the Probate Court, and is unappealed from, the minors are precluded from setting up title to the property itself, so long as the judgment of homologation subsists, showing they have received the price..... *ib.*
4. Judgments rendered by courts of competent jurisdiction, against minors duly and legally represented, so long as they are not reversed or declared null, have the same force and validity as if the parties were of full age..... *ib.*
5. Where the creditors of an insolvent succession, in which there are minors interested, and who have accepted it with the benefit of inventory, meet and concur with a family meeting in behalf of the minors, that the property be sold on certain terms and credits, the sale will be legal and confer a valid title on the purchasers, even if it sell for less than the appraised value..... *Toules's Administratrix vs. Weeks et als.* 312
6. A sound interpretation of the law in relation to the administration of estates, whether vacant or accepted with benefit of inventory, will, in many cases, authorise a departure from the rule requiring property of minors to bring its appraised value..... *ib.*

MORTGAGE.

1. The *procès verbal* of a sale, in which a mortgage is retained, made by the parish judge, acting as auctioneer, and duly recorded in the parish judge's office, is full evidence of the mortgage, which is binding on third possessors of the mortgaged property..... *Babin's Heirs vs. Winchester*, 460
2. The identification of the note sued on with a mortgage taken to secure its payment, may be shown by circumstantial and parole evidence, without the paraph *ne varietur*..... *ib.*
3. Among the different privileges and mortgages which may exist on ships and other vessels, none is given to the wife..... *Lose vs. Dimitry et als.* 485
4. Ships and vessels are subject to hypothecation, though not like immoveables and slaves, but only according to the laws and usages of commerce..... *ib.*

5. The legal mortgage of the wife does not attach to ships and vessels, as the hypothecation is not effected according to the laws and usages of commerce.....*Lose vs. Dimitry et als.* 485

6. The provisions in the Louisiana Code, that "ships and other vessels" are susceptible of being mortgaged, is restricted to hypothecations made according to the laws and usages of commerce. In whatever cases those usages and laws would recognise the validity of an hypothecation of a vessel, our code also recognises it, and in none other.

Malcolm & Wood vs. Schooner Henrietta et als. 488

7. So, where a conventional mortgage on a schooner, executed by the owner, in favor of a creditor to secure the payment of a debt, and duly recorded in the mortgage office, was sought to be enforced: *Held*, that such a mortgage has no effect; and that ships are not subject to the same incumbrances which attach to immoveables, as lands and slaves, situated within the constant operation of the laws of the state..... *ib.*

8. In an action of mortgage, based on an account and debt which is shown to be grossly erroneous in its calculations and amount, the debt will be set aside for adjustment, and the contract of mortgage annulled and cancelled, as being made in error.....*Trudeau vs. Mather,* 554

NEW TRIAL.

1. The party demanding a new trial, on the ground of newly discovered evidence since the first trial, must show, not only due diligence before, but that the evidence is competent and material.....*Ingram vs. Croft,* 82

2. So an affidavit setting forth that certain depositions taken in another suit, to which the plaintiff was a party, but not between the same parties, is insufficient to obtain a new trial, on the ground of newly discovered evidence..... *ib.*

3. A new trial will not be granted on the allegation, that the verdict is contrary to law and evidence, when on an examination of the evidence, it does not appear the jury were clearly wrong.....*Williams vs. Bethany,* 92

4. Where the defendants claim title to certain property under an act *sous seing privé*, dated on a particular day in Baton Rouge, and the plaintiffs show, that on that very day, in another state, one hundred and seventy miles distant, the same vendor executed a power of attorney before a justice of the peace, to the same vendee: *Held*, that this fact, connected with the circumstance that this person, executing the two acts, had at that time left the state, to avoid a criminal prosecution, will be considered such violent presumption of forgery and perjury, as will require the verdict to be set aside, and the cause remanded for a new trial.....*Keys et als. vs. Powell & Wife,* 143

5. Where there is not such a statement of facts as the Code of Practice requires, and the evidence not sufficiently complete to enable the court to examine the case on the merits, yet when justice requires it, the cause will be remanded for a new trial.....*McDaniel vs. Insall*, 241
6. It is the uniform practice of the Supreme Court, when without the fault of the appellant, his case cannot be placed before it, to have a revision of the judgment of the inferior court on the merits, and when justice requires it, to remand the cause for a new trial*Griffith & Wife vs. Miner*, 344
7. Relief will be granted on a motion for a new trial, when it will not be extended to a case in which it is sought to set aside a final judgment, in order to make a valid defence to the merits.....*Small vs. Flint & Thomas*, 352

NOTES.—SEE BILLS OF EXCHANGE AND PROMISSORY NOTES.

NOTICE OF PROTEST.

1. Of the fact stated in the notary's certificate, that due diligence was used by him to find the residence of the party but in vain, and of notice to him being deposited in the post-office, the certificate itself, must be taken as *prima facie* evidence.....*Preston vs. Dayson et als*. 7
2. The statute of the 13th March, 1827, concerning protests of bills and notes, does not change the usage or rule of the commercial law, in relation to the diligence to be used in serving *notices* of protest, but merely provides a new mode of proof of such diligence..... *ib.*
3. When the statute speaks of due diligence in giving *notice*, without defining in what it shall consist, it refers necessarily to the existing rule, according to commercial law or usage..... *ib.*
4. If the holder of a bill uses reasonable diligence to discover the residence of the endorser, *notice* given as soon as this is discovered, is *due notice* of the dishonor of the bill, within the usage and custom of merchants..... *ib.*
5. When the notary certifies, that after using diligent inquiry, without being able to find the party's residence, intended to be charged by the notice, if notice is lodged in the nearest post-office, addressed to him at the place where the contract is made, it is deemed equivalent to personal notice..... *ib.*

OBLIGATIONS.

1. Where parties enter into an obligation containing a penalty of seven thousand dollars, for the faithful payment of a sum not exceeding five thousand dollars at a particular time, on failure of the principal to comply, the surety will only be bound for the principal sum stipulated to be paid, and not the penalty.....*Reynolds, Byrne & Co. vs. Yarbrough*, 188

2. The penal clause in the obligation, is the compensation for the damages the creditor sustains, by the non-execution of the principal obligation.
Reynolds, Byrne & Co. vs. Yarrowborough, 188
3. But damages due for the delay in the performance of an obligation to pay money, are called interest..... *ib.*
4. In an action to recover the principal sum, and to enforce the performance of the primary obligation in a contract, the commencement of suit, puts the defendant in default, in relation to damages..... *ib.*
5. But in an action to recover damages for the non-performance of the obligation, proof of putting the party *in mora* by a special demand, must be made. *ib.*

OFFICERS.

1. Officers of the army of the United States, stationed on duty in this state, do not cease to be citizens of the states in which they resided, and exercised the rights of citizenship when called into service.
Stoker vs. Leavenworth et al. 390

PARTITION.

1. A partition among heirs of property really belonging to the estate inherited, although not homologated in due time, which is informal and only provisional, gives to each heir a separate and good and valid title to the property partaken by each, until annulled or changed on the application of those interested in the property of the succession.
Cooney's Heirs vs. Clark, 156
2. According to the laws of Louisiana, the adjustment of profits and settlement of accounts among joint owners of ships, is a necessary incident to the action of partition.....*State vs. Judge Walls*, 440

PARISH TAXES

1. In the division of the parish of Ouachita, and establishment of the parish of Carroll, in 1832, the law provides, that the taxes for 1831, in the part embraced by the new parish of Carroll, shall be collected by the sheriff of Ouachita, and by him paid over to the sheriff of Carroll: *Held*, that the sheriff who came into office in Ouachita, after the taxes were collected, was not responsible for their payment; and for any sums he collected as deputy of his predecessor, he is not liable except to his principal.
Clary vs. Grayson, 371

PARTNERSHIP.

PAGE.

1. On the death of a partner leaving several surviving ones, neither has the right of suing alone as *surviving partner*, nor has one the right to sue as surviving partner for the use of them both, when there are two surviving.

David Flower vs. Rachael O'Conner, 194

2. In all commercial partnerships, the surviving partner, in order to receive the portion of the deceased partner, and hold it subject to the payment of the partnership debts, must make application to the Court of Probates, have such portion ascertained and valued, and give bond with security..... *ib.*

3. A surviving partner does not possess the right, until he is authorised by the Court of Probates, to sue for or receive partnership debts..... *ib.*

4. Where a partnership is composed of several partners, and by the articles of agreement, one of them is to be a silent partner, the others cannot, by mutual consent, before its expiration, dissolve the partnership, without the consent of the silent partner..... *Stevenson vs. Shields*, 433

5. Where a partner sues the acceptor of a bill, endorsed by the payee to the partnership, and the plaintiff sues in his own name for the use of the firm, which he alleges is composed of himself and another, but is dissolved by mutual consent, and it appears by the articles of partnership, there was a silent partner, who had not consented to the dissolution: *Held*, that the action cannot be maintained, because the interest of the silent partner in the bill, by the endorsement to the firm of which he was a member, could not be divested without his consent..... *ib.*

POSSESSION.

1. Where a person has a right of possession, and suffers his adversary to remain in peaceable possession more than a year, he forfeits his right to a possessory action, and has no remedy but the petitory.

Yarborough vs. Palmer, 153

2. The right of possession and actual possession, authorise the possessor to bring an action of trespass, and it is the province of the jury to assess the damages..... *ib.*

3 The principle that possession of a part of a tract of land, is possession of the whole, and sufficient to prevent the adverse party from acquiring absolute title by prescription, cannot prevail over the adverse possession of the other party, under a title of higher dignity, and a definite location by authority of the sovereign..... *D'Arby's Heirs vs. Blanchet's Heirs*, 256

PRACTICE.

1. Under the prayer for general relief, suited to the nature and justice of the case, the Supreme Court will render such judgment as would be given in a new suit, to avoid circuitry of actions.....*Smith vs. Corcoran et als.* 46
2. When on an attentive examination of the evidence, it does not warrant the court to interfere with the verdict, the case will not be remanded..... *Greenfield vs. Manning et als.* 56
3. The reference to the record of a suit to show that it interrupted prescription, is insufficient to enable the Supreme Court to determine whether prescription was really interrupted.*M'Micken vs. Weems, Curator, &c.* 66
4. When the evidence is insufficient to determine the fact of the interruption of prescription, but which can be ascertained, justice requires that the case be remanded for a new trial..... *ib.*
5. Forfeited penalties are recoverable on motion, without the formality of any pleadings..... *State vs. Hay et als.* 78
6. The plea of the general issue, and the plea of prescription, are not inconsistent with each other.....*Ingram vs. Craft,* 82
7. Where a married woman is sued as heir, it is necessary that the husband be cited to assist his wife in defending the suit.
Lanoue vs. Reed et als. 112
8. Under the prayer for general relief, when the evidence shows an agreement of the defendant to pay a certain sum, as the balance of the price of a slave, the court will consider itself authorised to give effect to the agreement, and terminate the controversy between the parties, although not alleged or asked for in the petition.....*Bradford's Heirs vs. Clark,* 147
9. Where fraud and simulation, or lesion, are not alleged, a judgment disregarding a written sale of a slave, will be declared erroneous, and be annulled and reversed..... *ib.*
10. When the record does not furnish a certificate, either by the judge or clerk, that it contains all the evidence on which the cause was tried, nor a statement of facts, it cannot be examined on its merits, but the court will decide on the questions of law, presented by the bills of exception in the record..... *Heirs of Kimball vs. Heirs of Lopez,* 173
11. The omission of the defendant to deny the plaintiff's capacity to sue, waives the right to do so, and dispenses him from the necessity of proving it, even when the demand is denied. The same consequence should follow when there is a legal presumption of its justice being confessed.
Lopez et als. vs. Bergel, 178
12. Pleas or exceptions that are not declinatory, need not be pleaded in *lemine litis*.....*David Flower vs. Rachel O'Conner,* 194

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13. Where parties agree to submit the matters in controversy between them, in a suit pending, to judicial arbitrators, it by no means follows, that the suit is to be dismissed without the consent of the plaintiff, on the motion or exception of the other party.....*W. & D. Flower vs. O'Conner*, 198
14. A plea of usury is not considered a peremptory exception, going to extinguish the action, and will not be received pending the trial, after the jury is sworn..... *ib.*
15. The possession of accounts rendered to the defendant when called for, may be evidence against him that such accounts were rendered, i. e. to prove *rem ipsam*. On refusal to produce them, the plaintiff has a right to give his affidavit in evidence to the jury, describing their contents and calling for the documents..... *ib.*
16. When an application is made for the production of documents in the possession of the opposite party, unaccompanied by affidavit, and duplicates of them are already in court, the order to produce them will be refused.... *ib.*
17. The plaintiff may compel the production of accounts or documents, furnished by him in the course of business, and which are in the hands of the opposite party, although they might not be legal evidence in the cause when produced, but are open to every legal objection..... *ib.*
18. Usury may be taken advantage of on the trial, even when not pleaded, if it appears from the petition or evidence offered by the plaintiff, that more than ten per cent. was stipulated...*W. & D. Flower vs. O'Conner*, 198
19. A waiver of the right to have the evidence taken down by the clerk, is not a waiver of the right to have a statement of facts, so as to enable the party to prosecute an appeal*Insall vs. M. Daniel*, 241
20. The voluntary waiver of the plea of prescription, by a party in a judicial proceeding, especially when accompanied by a concession on the part of his adversary, made in consequence thereof, is the strongest presumption of the renunciation of the right itself...*Coon vs. Brashear et als.* 263
21. The plaintiff has a right on proving his demand, to have a judgment by default made final, without waiting for it to be called regularly on the docket.....*Small vs. Flint & Thomas*, 352
22. Entering a formal appearance of a defendant in a civil suit, is unknown to the practice in Louisiana.....*Stoker vs. Learenworth et al.* 390
23. Where a motion is made to dismiss the suit, for want of service of the petition on the defendant, in the French language, his vernacular tongue, the plaintiff was permitted at the same time to amend, by filing a copy of the petition in French, and having it served on the defendant.

Thomas vs. Baillo, 410

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24. The Code of Practice does not pronounce the absolute nullity of a petition or pleadings defective in form only; the nullity is relative, and the party has a right to amend his pleadings.....*Thomas vs. Baillo*, 410
25. The court is forbidden to give any weight to evidence in a record, which is foreign to the question at issue..... *ib.*
26. Where the judge *a quo* states the law in the way most favorable to the defendant, in his charge to the jury, the latter has no cause to complain, and the verdict will not be disturbed..... *Stewart vs. Paulding*, 508
27. Where the syndic makes himself a party plaintiff to a suit, in the place of the original one, who is a ceding debtor, without objection on the part of the defendant, he has a right to contest the case and receive judgment.....*Tulhill & Fuller vs. Emerson*, 593
28. The objection to the plaintiff's capacity to sue, comes too late, after answer to the merits, and the jury are sworn on the trial..... *ib.*
29. Where the plaintiff sues as the heir of his wife, and his capacity to sue is not denied by the pleadings, he is not required to prove his wife's death.....*Featherstone vs. Robinson*, 596
30. Irregularity and impropriety in the form of action, is waived by pleading to the merits, and proceeding to trial without making the objection..... *ib.*

PRESCRIPTION.

1. An alteration within the time allowed to acquire a servitude by prescription, which is made on the eave of the roof of the house of A, and which had a tendency to lighten the burden of the servitude, is not considered as an interruption so as to prevent prescription from running.
Vincent vs. Michel, 52
2. The reference to the record of a suit, to show that it interrupted prescription, is insufficient to enable the Supreme Court to determine whether prescription was really interrupted.
M. Micken vs. Weems, Curator, &c. 66
3. When the evidence is insufficient to determine the fact of the interruption of prescription, but which can be ascertained, justice requires the case should be remanded for a new trial..... *ib.*
4. Proof of possession is indispensable to support a title, based on the plea of prescription..... *Green vs. Hudson's Syndics*, 120
5. The vendor from whom the defendant's title is derived, is an incompetent witness, to prove the possession of the latter, so as to form the basis of a title by prescription..... *ib.*

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6. The defendant's acknowledgment and promise to pay his note, before and after the lapse of *five* years from the time it became due, and before suit is brought, will take the case out of prescription, when the action would otherwise be barred.....*Lopes et als. vs. Bergel*, 178
7. Where land has been possessed, even under an erroneous location, for more than thirty years in conformity to it, in the presence of the adverse claimant, the plea of prescription will prevail, and the possessors quieted in their possession.....*D'Arby's Heirs vs. Blanchet's Heirs*, 256
8. Prescription when once acquired, may be either tacitly or expressly renounced.....*Coon vs. Brashear et als.* 265
9. Where a party once voluntarily renounces prescription in his favor, in the course of the trial in the inferior court, he cannot renew it, or avail himself of it in the Supreme Court..... *ib.*
10. In an action of warranty, prescription only runs from the date of eviction. If the action is commenced within ten years, it is in time to prevent prescription.....*Babin's Heirs vs. Winchester*, 460
11. The action of mortgage is not barred by prescription, when commenced within ten years from the time when the debt became due and payable *ib.*
12. Where the defendant lives alternately in Kentucky and Louisiana, prescription only runs for the time he is actually in the state.
Guillet vs. Erwin, 580
13. So where two years had elapsed, from the date of the sale until institution of suit for redhibitory vices in slaves, and it was shown the defendant had only been ten months in the state, during that time: *Held*, the action was not prescribed by the lapse of one year..... *ib.*

REDHIBITION.

1. Redhibitory defects or vices, which are made known by the vendor to the vendee, at or before the sale, cannot be urged in evidence, or in any manner set up against the sale.....*Hawkins vs. Brown et al.* 417
2. The redhibitory action for the rescission of the sale and return of the price of a slave, will be sustained for any vice or defect which renders the slave either absolutely useless, or its use so inconvenient and imperfect that it must be supposed the buyer would not have purchased with a knowledge of the vices.....*Icar vs. Suárez*, 517

REMOVAL OF CAUSES.

1. Filing a plea, exception or answer, is the only entry of appearance required; and in an application for the removal of a cause to the United

States District Court, filing the petition for such removal, is evidence of the defendant's appearance.....*Stoker vs. Leavenworth et al.* 390

2. When a proper case is made for the removal of a cause to the United States Court by the defendant, no judgment by default is permitted, but the court is bound to order the removal *instantly*..... *ib.*

3. Exceptions or counter affidavits are not allowed against a proper application of a defendant, for the removal of the suit against him to the United States Court..... *ib.*

4. In an application for the removal of a cause from the State to the United States District Court, where the defendant alleged the plaintiff was a citizen of a certain parish, as appears by his petition, which states also that the plaintiff is a resident: Held, to be a sufficient allegation of citizenship, in relation to the plaintiff..... *ib.*

RES JUDICATA.

1. A judgment quashing an execution, has not passed in *rem judicatem*, when the matter in dispute is appealable, and a year has not elapsed from the date of it to the time of trial, when it is offered in evidence to show the writ erroneously issued and was properly quashed.....*Escurix vs. Daboval*, 575

SALE.

1. Without an assessment of a state tax, the officer has no warrant or authority to sell non-resident's land therefor, and which is indispensable to make out a valid title under a collector's sale for taxes.

Smith vs. Corcoran et al. 46

2. The recitals in the treasurer's deed, to land sold for taxes, is no evidence that it was legally assessed, as the fact of assessment was not within his cognizance. *ib.*

3. Where the conduct of a bidder at a sheriff's sale, is of such a character as to prevent competition in bidding and deprive the owner of a higher price for his property than would otherwise have been obtained, the owner may have the sale annulled, and such damages awarded against the purchaser as a jury may assess to be reasonably sustained.

Liles vs. Rhodes, 87

4. Where the sale made by a sheriff is rescinded, on account of the improper conduct of the buyer at the time of sale, the owner must refund the price which was paid..... *ib.*

5. But where the owner of land sold at sheriff's sale, obtains a rescission of the sale, with damages against the purchaser, the latter may go in compensation of the price which is to be refunded..... *ib.*

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6. Where the payee of a promissory note, payable to order, transfers it in writing, on the back of the instrument, for twenty per cent. discount, it will be considered a sale, not an endorsement in which the purchaser will be considered as having taken the risk of the solvency of the maker, without recourse on the transferror; and such a contract is in its nature aleatory, and not usurious.....*Romero et als. vs. Segura*, 307
7. Where the sale of a promissory note by the payee, who is in insolvent circumstances, has been made for one-fifth less than the amount promised on the face of it, such sale may be rescinded by the creditors of the insolvent; but they would be bound, first to refund the purchase money, when there is no evidence of fraud..... *ib.*
8. Where the creditors of an insolvent succession, in which there are minors interested, who have accepted with the benefit of inventory, meet and concur with a family meeting, in behalf of said minors, that the property be sold on certain terms and credits, the sale will be legal and confer a valid title on the purchasers, even if it sell for less than the appraised value.
Toules's Administratrix vs. Weeks et als. 311
9. The purchasers of a debt, at sheriff's sale, stand in the same relation to the person who owes it, as the creditor of the latter would or did before the sale; and whatever defence would avail the original debtor against his creditor, is equally valid against his vendees.....*Andrus et als. vs. Chretien*, 318
10. In a sale *per aversionem*, with reference to known definite boundaries, they will control the enumeration of quantity; and the purchaser is not entitled to a diminution of price, proportioned to a diminution of the quantity.....*Gormley et al. vs. Oakley et als.* 452
11. So where a sale is made, with reference to a natural boundary on one side, and on the other two sides by lands of the adjoining proprietors, and the length of all the lines are given on a plan annexed to the conveyance, and the whole is sold for a given sum: *Held*, that it is a sale *per aversionem*, and the purchaser bought whatever is embraced within those limits and nothing more, although less than the quantity specified as sold in the act of sale..... *ib.*
12. Where the bidder at an auction sale fails to comply with his bid, the seller may, after the customary advertisement, at the end of ten days, re-sell the property, and the bidder is liable for the deficiency in price and costs of sale, between the first and second adjudication.....*Stewart vs. Paulding*, 406
13. Neither the bidder or vendor is obliged to perform his part of the terms of an auction sale, until requested to do so by the other..... *ib.*
14. The vendor of an auction sale, has the choice of two remedies, in case of non-compliance by the bidder, *i. e.*, to demand the price, or have the property re-sold on account of the latter..... *ib.*

15. In an absolute or defeasible sale, the property does not pass from the vendor, with regard to third persons, until tradition takes place; but before the tradition, the vendee has *jus ad rem*, though not *in re*.

Garrison vs. His Creditors, 551

16. So where a bill of sale is taken on a steam-boat, to secure the payment of a sum of money, executed between the parties in the State of Tennessee, and registered in a court there, and the boat is afterwards brought to this state and sold by the syndic of the creditors of the owner: *Held*, that the bill of sale is valid, although defeasible on payment of the money, and that the sale by the syndic changed the remedy, without affecting the creditor's rights, who is still entitled to the proceeds..... *ib.*

17. In a sale of property under execution, on twelve month's credit, the purchaser is required to give bond for the whole amount of principal, interest and costs due on the day of sale, as if made for cash; and on that aggregate sum, the same rate of interest is allowed in the bond as that on the original debt from the day of sale.....*Hilligsberg vs. Holmes*, 565

SEIZURE.

1. The seizure under a writ of *feri facias*, of a schooner or other moveable property of the husband, takes it from his possession, so that a subsequent judgment against him, by his wife, with her legal mortgage; cannot affect it.....*Lose vs. Dimitry et als.* 485

SELLER AND BUYER.

1. Where the defendant purchased a sugar mill of the plaintiff, who is a merchant, part of which broke in pieces on being put up, the latter is not responsible for the defects, unless he knew it was of bad quality, and represented it as good.....*Barclay vs. Conrad et als.* 261

2. The buyer cannot set up redhibitory defects in the thing sold and purchased by him, when sued for the price, after having sold it to another. By selling it he affirms the first sale..... *ib.*

3. Where a merchant sells a sugar mill, which proves defective after being put up, he is still entitled to recover the price, unless there was some concealed defect; or he had represented it as sound when not so..... *ib.*

4. Where the bidder to whom property is adjudicated, fails to comply with the terms of sale, the seller may, at the end of ten days after the customary advertisements, re-sell the property, by re-advertising it according to law ten days, and the bidder is liable for the deficiency in price, between the first and second sale.....*Stewart vs. Paulding*, 506

SEQUESTRATION.

PAGE.

1. A petition for an order of sequestration, is not an amendment of the original pleadings; but is in a manner wholly unconnected with them, and does not require the leave of the court to file it....*Leavenworth vs. Plunket*, 341
2. To obtain an order of sequestration of a tract of land, to prevent the possessor from committing waste and using the fruits and revenues, the affidavit must set forth a *legal* cause, that the party obtaining it has *good ground* of apprehension, &c. It is insufficient to state he has *ground* to apprehend, &c..... *ib.*

SERVITUDE.

1. A right of servitude which rests solely on the acquiescence of the plaintiff, in the burden imposed on his property, by suffering without complaint, the drip from the defendant's house, to fall on his lot or grounds for ten years and upwards, is acquired by prescription.....*Vincent vs. Michel*, 52
2. Where the possession or continuation of the servitude of right of drip from the eaves of A's house, on the lot of B, is proven to have existed more than ten years, B is barred from bringing his action of damages, or to abate it as a nuisance against A..... *ib.*

SLAVES.

1. In a conflict of laws between two states, where a testator in Georgia bequeathed to certain of his slaves their freedom, to take effect five years after his death, and before the expiration of the five years the testamentary executor brings the slaves to Louisiana; and it is shown that, at the time of the bequest of freedom the laws of Georgia prohibited the manumission of slaves, except by application to the legislature: *Held*, that the bequest in the will being prohibited by the laws of the State where it was made, is null and void.....*Mary, f. w. c. vs. Morris et als.* 135
2. The bequest of liberty to slaves which is made in contravention of the law of a state, enacted for the security of the public peace and good order of the community, is absolutely null and void; and such slaves do not, *ipso facto*, become free under the will on being brought into this State, where slavery is tolerated, but in which slaves may be manumitted by will. *ib.*
3. In a suit for freedom, when the question is *libera vel non*, and the plaintiff being, from her color and possession of the defendant, presumed a slave, the burden of proving freedom devolves on the plaintiff..... *ib.*
4. Proof of the residence of a slave, in a free state, the constitution of which forbids slavery, during the space of two or three years, unconnected with any other proof, is insufficient in law to entitle such slave to his freedom.
Louis, f. m. c. vs. Cabarrus et als. 170

5. The residence of a slave in a state where slavery is forbidden, contrary to the will of his master, does not deprive the latter of his right to his property.....*Louis, f. m. c. vs. Cabarrus et als.* 170

6. The consent of the owner of a slave that he should go and perform work and labor in a free state, does not, of itself, free the slave, though this may be effected by the slave's going there under this permission..... *ib.*

SUCCESSION.

1. The succession of the son dying without issue, leaving only his mother to inherit, becomes her paraphernal property, and she has a right to administer it without the interference of her husband.

W. & D. Flower vs. O'Conner, 198

2. The acceptance of the succession of the son by the mother, with the consent of her husband and the benefit of inventory, is an engagement as relates to creditors, that if she did not administer it according to law as beneficiary heir, she would be personally liable for the debts..... *ib.*

3. Where a succession is administered as an insolvent one, and there are judgment and mortgage creditors, they have a right to demand a forced sale for cash; and in the event of the property not bringing its appraised value, a credit of one year must be allowed.

Towles's Administratrix vs. Weeks et als. 312

SURETY.

1. The surety in an attachment bond, executed by the plaintiff, is not liable to an action by the intervenor, although the latter may recover in the attachment suit.....*Raspillier vs. Brownson,* 231

TRANSACTIONS.

1. Transactions have, between the parties, the authority of the thing adjudged; and where the parties compromise generally on all differences, the titles which are unknown and afterwards discovered, are not cause for rescinding the transaction, unless they have been concealed purposely by one of the parties.....*Grouniz et als. f. p. c. vs. Abat's Executors,* 17

2. And where the renunciation of all claims and demands, in an act of compromise or transaction, is full and explicit, and no mention is made of a latent title to certain property included in the transaction, but no evidence showing that the title was concealed on purpose by the party, the transaction will not be rescinded..... *ib.*

TRESPASSER.

1. Where a party by contract has a right to certain premises, on performance of a condition precedent, and he fails, but enters on the premises in

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- pursuance of his contract, and the adverse party suffers him to remain in possession more than a year; if the latter afterwards enters and takes forcible possession, he will be considered a *trespasser*, and liable to damages.
Yarberough vs. Palmer, 153
2. Purchasers of property from persons having the apparent right to sell, are not to be considered as trespassers.....*Spotts vs. Lange et al.* 182

TUTOR.

1. The mother or surviving parent, as tutor or tutrix, may refuse the administration of her minor children's property, yet retain the superintendence of them, and the care of their education.
Berluchaux vs. Berluchaux et als. 539
2. The person appointed to manage and administer minor's property, on the refusal of the natural tutrix to take that office, is termed a tutor *ad bona*; and this appointment may be made to minors of a person other than the natural tutrix, even when she is present and residing in the state..... *ib.*
3. Where a surviving parent resides in a foreign state or country with his children who inherit property in this, perhaps on proof that he had complied with the laws of the place of his residence, and had obtained full authority, as tutor, to administer his wards' property, he might appoint an attorney in fact to represent their interests, at least so far as to make partition of a succession held in common with co-heirs residing here..... *ib.*
4. According to the Spanish law, the tutorship of the mother is required to be conferred and confirmed by the Judge in the same manner as of any other near relation on whom the office is cast by law..... *ib.*
5. The father may confer the tutorship by will, which supersedes any appointment by the judge..... *ib.*
6. It is the duty of the relations of a minor, residing in this state, to provoke the appointment of a tutor, whether the minor be or be not domiciliated therein..... *ib.*
7. Where a minor resides in a foreign country and inherits property in this state, a tutor *ad bona* must be appointed to make partition or administer it..... *ib.*
8. A mother residing in a foreign country with her minor children, who inherit property in this, on coming here would be preferred to all others in obtaining the administration of their inheritance..... *ib.*
9. It is a general principle, admitted by the comity of nations, that the tutor of a minor, deriving his authority from the law of their common domicil, has a right to exercise the actions of his pupil every where.
Berluchaux vs. Berluchaux et al. 545

The law 9, tit. 16, Partida 6, adopts the system of the Roman law in the 118th novel of Justinian, requiring the mother who accepts the tutorship of her children, other than that conferred by testament, to give security.

Berluchaux vs. Berluchaux et als. 545

VERDICT.

1. Where all the facts and circumstances of a case are placed before the jury who make up their verdict on all the evidence adduced, with a knowledge of the parties, they are considered much more competent to decide between the parties litigant than the court, which is bound to respect their verdict, unless clearly erroneous in law, or manifestly contrary to, or without legal evidence.....*Hewet & Co. vs. Wilson et als.* 71

2. A verdict found on the plea of fraud and collusion, is entitled to particular attention, because they are the peculiar objects for the cognizance of a jury.....*Burroughs vs. Nettles,* 113

3. Where a mass of facts, relating to the settlement of a succession and the accounts of a mercantile firm, and where fraud and circumvention is charged, are all submitted to a jury, who appear to have carefully allowed the debits and credits between the parties, their verdict will not be disturbed.
W. & D. Flower vs. O'Connor, 198

4. On a mere matter of fact, submitted to a jury, where the evidence does not show the verdict to be clearly wrong, the verdict and judgment will not be disturbed.....*Lapointe vs. Guidry,* 246

5. The Supreme Court can judge only of the effect of the whole evidence of the case, taken together, and whether the verdict of the jury is manifestly against, or without legal evidence. If not of this character, it will not be disturbed.....*Coen vs. Brashear et als.* 265

6. On an issue of fraud, the verdict of the jury is entitled to great weight; yet, on examining the evidence, if it appears the demands of justice would be best promoted by another trial, the cause will be remanded.

Castel & Devaux vs. Their Creditors, 575

WAGES.

1. Where a workman sues to recover his wages, at a stipulated hire per month, as a brick-layer, and evidence is introduced, without objection, to prove the usual wages of that class of mechanics, the jury are the judges of the value of the work charged as having been done, on the evidence before them.....*Coen vs. Brashear et als.* 265

2. In a suit to recover wages, at a stipulated hire per month, by a mechanic, it is sufficient for him to prove his contract and the length of time he was in the defendant's employment..... *ib.*

INDEX OF WARRANTY.

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1. The vendor is bound in warranty to his vendee, when his deed of sale does not exclude it. His obligation extends at least so far as to require him to refund, with interest, in case of eviction.....*Green vs. Hudson's Syndics*, 120

2. Where two purchasers join in the purchase of a boat, its load and cargo, and one acts as agent of the other, when sued jointly for the price, the one who authorised the other to act as his agent cannot call his co-defendant in warranty.....*Spotts vs. Lange & Longuepe*, 182

3. The administrator of an estate is the legal vendor of the property at probate sale, whose declarations are to govern in regard to its conditions and terms, and the legal warranty resulting therefrom.

Hawkins vs. Brown et als. 417

4. The sale of property legally made by the administrator, binds the heirs in warranty..... *ib.*

5. The vendor, when called in warranty, in a sale *per averiorem*, is not bound to make good the quantity of land specified in the act of sale, but only the extent and quantity contained within the defined limits, by which he sold.....*Gormley et al. vs. Oakley et als.* 452

6. The vendor is not bound to warrant what he never sold; and when the vendee has not been evicted of any part of the land sold, which was conveyed by certain definite boundaries, he cannot recover of his warrantor, although the quantity actually sold, was less than that set forth in the deed. *ib.*

WILL.

1. The Spanish law required as an indispensable solemnity to the validity of a testament or will, that it should be signed by the testator and witnesses, or by some one of the witnesses for him or them at least.

Vidal's Heirs vs. Duplantier, 37

2. The principle has been settled, that according to the Spanish law, it is not absolutely necessary for the validity of a testament or will, that all the required solemnities should appear on the face of the testament itself; but that some apparent defects may be cured or supplied by proof, when the instrument is offered for probate..... *ib.*

3. In the construction and interpretation of wills, the intention of the testator must be sought in the words he has used in the will, and not *aliunde*.....*Theall vs. Theall et als.* 228

4. Constructions and interpretations of wills, are not resorted to for the discovery of the testator's intention, when he has used none but plain unequivocal expressions..... *ib.*

5. A testator must be presumed to know that his own property alone, can be disposed of in his will..... *ib.*
6. So where a community of property exists, and the testator in his olographic will, declares he wishes the rest of *his property* (after making legacies) both real and personal divided as follows: "*One half to his wife and the other half to his brother's children, &c*:" *Held*, that the wife first takes half the community, and then one half of the other half, after deducting debts and legacies..... *ib.*
7. The Civil Code of 1808, required all the formalities in a will to be complied with, before turning aside to other acts, but did require mention of these in the will..... *Featherstone vs. Robinson*, 596

WITNESS.

1. Where a witness swears from his *impressions*, that a fact is so and so, it is insufficient, and the testimony should be rejected..... *Ingram vs. Croft*, 82
2. The testimony of one witness to a signature, who swears he saw the party sign, and whose credibility is not impeached, will not be invalidated by the negative statements on oath of two witnesses, made on a comparison of hand writing of the party, and his signature to documents on file in the suit..... *Bell vs. Norwood, Administrator*, 95
3. Where the amount of a debt, or an agreement to pay money, exceeds the sum of five hundred dollars, the testimony of one witness alone, is insufficient to prove it..... *ib.*
4. In a suit involving the question of limits and boundaries between two tracts of land, where the parish surveyor, called as a witness, was asked the following question: "were you called upon as a surveyor of the state, to fix the boundaries between the parties, under the provisions of the Civil Code, where would you establish it with the lights before you?" *Held*, that the question was illegal, as the answer would have been to decide at once the controversy between the parties, as well questions of law as of fact, and cut the knot, which courts and juries had labored years to untie.
Bowman vs. Flower, 106
5. Surveyors when called as witnesses, may properly be questioned as to the appearance of old lines, marks upon trees, and similar facts connected with their profession..... *ib.*
6. The vendor from whom the defendant's title is derived, is an incompetent witness to prove the possession of the latter, so as to form the basis of a title by prescription..... *Green vs. Hudson's Syndics*, 120
7. The vendor is an incompetent witness on the ground of interest, for a party deriving title from him, even when his deed to his vendee, contains no clause of warranty..... *ib.*

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8. A sheriff cannot be called as a witness to prove what proceedings took place at a certain sale made by him, when the return made on the execution is silent, or stated the execution had been stayed by order of the District Court.....*Heirs of Kimball vs. Heirs of Lopes*, 173
9. An attorney at law, receiving or to receive a per centage on the sum collected or recovered, or who is to receive a stipulated fee, is not thereby disqualified, on the score of interest, from testifying in his client's cause.
W. & D. Flower vs. O'Conner, 198
10. In the cross examination of plaintiff's witness, the defendant cannot require him to detail declarations of the defendant, made out of the presence of the plaintiff, and which make evidence against him..... *ib.*
11. On cross examination, plaintiff's witness becomes that of defendant, and the latter cannot make his own declarations, made out of the presence of the other party, evidence in favor of himself..... *ib.*
12. In a suit for a separation from bed and board, the children, both majors and minors of the plaintiff, are competent witnesses to testify in her behalf.....*Savoie vs. Ignogoso*, 231

WORK BY THE JOB.

1. Where the plaintiff, being dismissed by the defendant from finishing a certain job of work, relies on the promise of the latter, to have an estimation made of the work actually done and pay accordingly, but who neglected to cause such appraisalment to be made, he ought to be bound by the estimation of appraisers appointed by himself: *Held*, that the plaintiff must show, either that the defendant concurred in the appointment of the experts, or that he was put legally in delay in relation to his promise, in order to make it binding.....*Bradley vs. Proctor*, 514

WRIT.

1. The writ of execution must pursue the judgment. But if the judgment be in itself vague and uncertain, it may be rendered certain by reference to the pleadings.....*Williams vs. Kelso*, 406
2. When a writ of possession is directed to the sheriff, a copy of the judgment and the petition to which it refers, must accompany the writ, in order that the officer may not be mistaken in the premises of which he is to give possession..... *ib.*

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